89- 1670

No. _____

In The

Supreme Court of the United States

October Term, 1989

GLORIA E. SOTO,

Petitioner,

v.

STATE OF NEW JERSEY, NEW JERSEY CASINO CONTROL COMMISSION AND DEPARTMENT OF LAW AND PUBLIC SAFETY DIVISION OF GAMING ENFORCEMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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QUESTIONS PRESENTED

1. Does a New Jersey statute which absolutely prohibits political contributions by certain individuals unconstitutionally impair the First Amendment rights of those individuals?

2. Is the state statute unconstitutionally overbroad insofar as it prohibits those individuals from contributing to any political organization or candidate in the state?

3. Is the state statute unconstitutionally vague insofar as it prohibits not only monetary contributions, but also contributions of any "thing of value"?

4. Does the application of this prohibition only to employees of casinos constitute a denial of equal protection under the Fourteenth Amendment?

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STATE OF NEW JERSEY, NEW JERSEY CASINO CONTROL COMMISSION AND DEPARTMENT OF LAW AND PUBLIC SAFETY DIVISION OF GAMING ENFORCEMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioner, Gloria E. Soto, respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division, entered on October 23, 1989.

OPINION BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, is reported at 236 N. J. Super. 303 and 565 A.2d 1088 and is reprinted in the Appendix, p. 2a,

infra. A petition for certification was denied by order of the Supreme Court of New Jersey dated January 23, 1990, which is reprinted in the Appendix, p. 1a, *infra*.

The opinion of the Superior Court of New Jersey, Chancery Division, was delivered orally and was not reported.

JURISDICTION

The judgment of the Superior Court of New Jersey, Appellate Division, was entered on October 23, 1989. That judgment affirmed an oral opinion rendered on October 13, 1987 by the Superior Court of New Jersey, Chancery Division.

The Supreme Court of New Jersey denied a timely petition for certification on January 23, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

New Jersey Statute Annotated § 5:12-138:

No applicant for or holder of a casino license, nor any holding, intermediary or subsidiary company thereof, nor any officer, director, casino key employee or principal employee of an applicant for or holder of a casino license or of any holding, intermediary or subsidiary company thereof nor any person or agent on behalf of any such applicant, holder, company or person, shall directly or indirectly, pay or contribute any money or thing of value to any candidate for nomination or election to any public office in this State, or to any committee of any political party in this State, or to any group, committee or association organized in support of any such candidate or political party.

STATEMENT OF THE CASE

N.J.S.A. § 5:12-138 was enacted by the New Jersey Legislature in 1977. It prohibits individuals who are licensed by the New Jersey Casino Control Commission ("Commission") as "key employees" and "principal employees"[1] of casinos from "directly or indirectly, pay[ing] or contribut[ing] any money or thing of value to any candidate for nomination or election to any public office in this State, or to any committee of any political party in this State, or to any group, committee or association organized in support of any such candidate or political party."

In July 1985, Petitioner, Gloria E. Soto, who was classified as a casino key employee, wrote to the Commission seeking its position as to whether *N.J.S.A.* § 5:12-138 permitted her to serve on the Platform Committee of the Democratic State Committee. The Commission responded that it would treat the letter as a petition for a declaratory ruling and that it required further information before reaching a decision. By the time that the Commission was ready to hear the matter, the Platform Committee had already concluded its business and submitted its report without Petitioner's participation.

Instead of withdrawing the request, Petitioner asked that it be expanded to cover the statute's applicability to participation on a political party committee or serving as

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[1] The terms "key employee" and "principal employee" are statutorily defined to encompass all casino employees deemed by the Casino Control Commission to have management or supervisory roles. See *N.J.S.A.* § 5:12-9, App. at 39a and § 5:12-38, App. at 39a.

a delegate to a state party convention. After the Commission requested still further information, Petitioner filed an amended petition seeking a declaratory ruling from the Commission that the statute was unconstitutional. The Commission then responded that it lacked jurisdiction to entertain or resolve constitutional challenges.

Following that response, in January 1987, Petitioner filed a Complaint in the Chancery Division of the Superior Court of New Jersey against the Commission and the Division of Gaming Enforcement ("Division"). The Complaint sought a declaration that the statute was unconstitutional because it abridged the freedoms of speech and association guaranteed by the First Amendment to the United States Constitution. The Complaint also sought a ruling that the statute was unconstitutionally vague and overbroad in that its incorporation of the phrase "thing of value" (i) provided no real measure to ascertain what specific conduct was prohibited and (ii) implicated numerous political associational activities protected by the First Amendment. The Complaint further alleged that *N.J.S.A.* § 5:12-138 violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against casino key employees.

The Division and the Commission filed answers and then moved to dismiss the Complaint or for summary judgment. On May 22, 1987, the Chancery Division denied the Motions without prejudice, retained jurisdiction, and ordered that the matter be referred to the Commission for a determination of the scope and definition of the phrase "thing of value" as used in Section 138, as applied to the proposed activities of Petitioner.

Petitioner thereupon requested that her petition before the Commission be amended to identify four specific proposed political committees in which she sought to participate: (i) the Platform Committee; (ii) the New Jersey Hispanic Democrats, including volunteering her services as an attorney; (iii) the "Committee of 200", requiring a membership fee of $1,000 per year; and (iv) the Affirmative Action Committee of the New Jersey Democratic Party.

On July 8, 1987, the Commission ruled that Petitioner could serve on the Platform Committee and the Affirmative Action Committee, but that she could not volunteer her services as an attorney to the New Jersey Hispanic Democrats, nor could she serve as a member of the Committee of 200.

Thereafter, the Commission and the Division renewed their Motions to Dismiss the Complaint in the Chancery Division. On October 13, 1987, the Chancery Division judge rendered an oral opinion declaring *N.J.S.A.* § 5:12-138 constitutional and dismissing the Complaint.

In reaching his decision, the Chancery Division judge held that although the statute infringed upon First Amendment freedoms, the limitation was of the "marginal type" referred to by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, (1976). The judge also concluded that the statute was not fatally overbroad or vague, and that it did not violate equal protection by singling out casino employees.

Petitioner appealed both the Chancery Division's decision and the Commission's ruling to the Appellate Division of the Superior Court of New Jersey. The Appellate Division identified the issues on appeal as including: (1) whether a blanket prohibition of political contributions is unconstitutional, (2) whether the Commission's definition of "thing of value" rendered the statute unconstitutionally vague, and (3) whether the statute invidiously discriminated against plaintiff and other casino employees in violation of their right to equal protection.

The Appellate Division held that the total prohibition imposed by the statute "involved little direct restraint on political contribution" and was outweighed by "the compelling state interest in maintaining the integrity of political parties and organizations from undue influence" by individuals in the casino industry. The court also held that the statute was "narrowly drawn and precisely tailored to serve the compelling interest of the state." Further, the court opined that the phrase "thing of value" was not unconstitutionally vague. Finally, the court held that the statute did not violate the Equal Protection Clause of the Fourteenth Amendment under either a "rational basis" or "strict scrutiny" test.

On November 27, 1989, Petitioner filed a Petition for Certification with the New Jersey Supreme Court. That Petition was denied on January 23, 1990.

REASONS FOR GRANTING THE PETITION

I. BY UPHOLDING AN ABSOLUTE BAN UPON POLITICAL CONTRIBUTIONS BY INDIVIDUALS, THE DECISION BELOW CONFLICTS WITH *BUCKLEY V. VALEO*

A. *Buckley* authorized limitations upon monetary contributions, but not an absolute prohibition.

The state statute at issue, *N.J.S.A.* § 5:12-138, imposes an absolute prohibition upon political contributions by certain casino employees, including Petitioner. In upholding the statute, the New Jersey appellate court relied principally upon this Court's opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976), which upheld a $1,000 limitation upon contributions to candidates for federal office. However, the lower court ignored the distinction between a *reasonable limitation* and an *absolute prohibition*. That distinction was critical to the result in *Buckley*.

While *Buckley* afforded somewhat greater protection to political expenditures, it did not diminish the First Amendment significance of political contributions. Indeed, the Court expressly recognized that restrictions upon *both* contributions and expenditures "operate in an area of the most fundamental First Amendment activities," *id.* at 14, and that contribution limitations are "subject to the closest scrutiny." *Id.* at 25, quoting *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958). Applying that rigorous test, the Court held that the limitation was constitutional because (i) it imposed only a "marginal restriction" and (ii) it was narrowly tailored to further an important governmental purpose. Neither of those arguments applies here.

The *Buckley* Court was able to conclude that the $1,000 limitation imposed "only a marginal restriction" upon First Amendment freedoms because the limitation only affected the *amount* of the contribution:

> The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. [424 U.S. at 21]

By contrast, a total prohibition does involve direct restraint, for its prevents even "the symbolic expression of support evidenced by a contribution." It forecloses entirely one of the most significant avenues for expressing one's political views. It also forecloses the individual from associating with others in any political organization or event which requires even a nominal contribution. Thus, an absolute prohibition plainly cannot be equated with the "marginal restriction" of a $1,000 limitation.

The governmental interest identified in *Buckley* was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of *large* financial contributions. . . ." 424 U.S. at 25; (emphasis added). The opinion made reference to "large"

or "unlimited" contributions several times, and concluded:

> The Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions – the narrow aspect of political association where the actuality and potential for corruption have been identified – while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. [424 U.S. at 28]

It is particularly significant that *Buckley* recognized the "substantial extent" to which individuals could still provide financial support to candidates and committees.

The court below stated that "the same fear of corruption of the political process relied upon by the Supreme Court in *Buckley* is equally present in this case." App. at 15a.[2] Yet unlike the federal statute upheld in *Buckley*, the New Jersey statute is not narrowly tailored to address the corrupting influence of large contributions; instead it sweeps broadly to prohibit even the smallest contribution. In so doing, it precludes attendance at $5 picnics and pancake breakfasts which often provide the greatest opportunity for political association. It likewise precludes

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[2] The appellate court also placed considerable emphasis upon the state's right to regulate the conduct of political parties. It was obviously unaware of this Court's recent opinion in *Eu v. San Francisco County Democratic Central Committee*, ___ U.S. ___, 109 S.Ct. 1013 (1989), which curtailed the power of states to impose such regulations.

joining a local political club which charges a $2 membership fee to defray its mailing costs.[3]

As this Court declared in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 265 (1986): "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." The New Jersey Legislature and courts have not met this standard. They have attempted to stretch *Buckley* far beyond the limits of its holding and its rationale. Only this Court can correct the error.

B. The vague prohibition on contributions of any "thing of value" compounds the First Amendment violation.

The New Jersey statute also runs afoul of *Buckley* in another significant respect. It prohibits not only monetary contributions, but also contributions of any "thing of value." Whereas *Buckley* noted that contribution limits left persons free "to associate actively through volunteering their services," 424 U.S. at 28, the New Jersey law chills this form of activity as well.

Petitioner argued below that the term "thing of value" was unconstitutionally vague. The appellate court

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[3] Moreover, while the statute is ostensibly intended to deal with the fear of corruption posed by casino gambling, which is permitted in only one of New Jersey's 567 municipalities, the prohibition extends to *every* political office in *every* municipality in the state, no matter how remote from Atlantic City and casino regulation.

acknowledged that "thing of value" was "a very elastic phrase," App. at 28a. It found that one aspect of this restriction, a ban on volunteering "professional services," required determination "on an *ad hoc* basis." App. at 29a. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries and for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.") It even went so far as to declare the term "professional services" *undefinable*. App. at 31a. Yet it concluded that neither "thing of value" nor "professional services" was unconstitutionally vague.

The chilling effect of this ruling is even more apparent when one considers the brief submitted below by respondent New Jersey Casino Control Commission. That agency, which has the duty to construe and enforce the state's casino laws – and to delicense individuals who violate those laws – stated that the statute is not limited to professional services, but rather is intended to prohibit any non-monetary contribution "which will foster a relationship of indebtedness between the political candidate or party and the contributor." Under this test, virtually any volunteer work could be held illegal. An individual who performs such services not only faces the loss of her casino license but also runs the risk of criminal prosecution. *See N.J.S.A.* § 5:12-120, App. at 39a-40a.

It is well established that penal laws must provide "narrowly drawn, reasonable and definite standards for the [administering] officials to follow. . . ." *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951). The present statute fails that test, leaving the administrative agency free to

decide whether any particular activity "fosters a relationship of indebtedness." The result is that the individual, already barred from making any monetary contribution, is effectively barred from performing volunteer work as well.

Even the broadest reading of *Buckley* cannot authorize a ban upon both monetary contributions and voluntary services. The Court should therefore grant certiorari to review the New Jersey statute in a manner consistent with *Buckley* and the First Amendment principles underlying it.

II. THE CASE PRESENTS AN IMPORTANT CONSTITUTIONAL ISSUE WHICH OUGHT TO BE RESOLVED BY THIS COURT

Restrictions upon political expression strike at the heart of the First Amendment. As this Court observed in *Buckley*, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaign for political office." 424 U.S. at 15, quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). This has led the Court in recent years to address the constitutionality of a variety of restrictions upon political contributions and expenditures.

However, none of those cases has involved restrictions upon political contributions by individuals; *Buckley* remains the last word on the subject. The Court has not directly addressed an absolute prohibition of individual contributions, nor has it had the opportunity to clarify the extent to which limitations upon such contributions

are constitutional. Granting certiorari will enable the Court to resolve this important First Amendment issue.

The decision below demonstrates the need for the Court's guidance. The New Jersey appellate court failed to draw any distinction between a $1,000 limitation and a blanket prohibition. It did not attempt to justify the far greater restraint upon First Amendment freedoms.[4] Instead, it simply brushed aside petitioner's concerns by stating three separate times that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." App. at 18a, 23a, and 37a, quoting *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 210 (1982).

We submit that where substantial restraints upon political expression and association are involved, such deference to legislative determinations is unwarranted. As this Court aptly stated in *Federal Election Commission v. National Conservative PAC*, 470 U.S. 480, 501 (1985): "We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restriction of clearly protected conduct." The refusal to allow monetary contributions of *any* amount to *any* political candidate or organization *anywhere* in the State of New Jersey plainly amounts to a "wholesale restriction of clearly

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[4] The clearest example of this is found in the equal protection analysis, where the appellate court concluded that the statute's prohibition "at most indirectly or insubstantially affects a fundamental right" and that a "rational basis" test would therefore suffice. App. at 34a.

protected conduct," and the further restraint upon contributing any "thing of value" compounds the problem.

As previously stated, it is petitioner's view that an absolute prohibition on individual contributions is contrary to the principles articulated in *Buckley*. However, if *Buckley* leaves room for doubt on this question, the Court should grant certiorari to address the constitutionality of an absolute prohibition and to resolve any lingering doubt once and for all.

CONCLUSION

For all of the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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SUPREME
COURT OF
NEW JERSEY
C-506
September Term
1989

31,150

IN THE MATTER OF THE PETITION
OF GLORIA E. SOTO FOR A
DECLARATORY RULING AS TO THE
APPLICABILITY OF *N.J.S.A.* 5:12-138
TO CERTAIN POLITICAL ACTIVITIES

GLORIA E. SOTO,

Plaintiff-Petitioner,

vs.

STATE OF NEW JERSEY, NEW
JERSEY CASINO CONTROL
COMMISSION, et al.,

Defendants-Respondents.

ON PETITION
FOR
CERTIFICATION

(Filed
Jan. 25, 1990)

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-6203-86T7 and A-1641-87T7 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 23rd day of January, 1990.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME
COURT

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR
COURT
OF NEW JERSEY
APPELLATE
DIVISION
A-6203-86T7
A-1641-87T7

IN THE MATTER OF THE PETITION
OF GLORIA E. SOTO FOR A
DECLARATORY RULING AS TO THE
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STATE OF NEW JERSEY,
NEW JERSEY CASINO CONTROL
COMMISSION AND DEPARTMENT
OF LAW AND PUBLIC SAFETY,
DIVISION OF GAMING
ENFORCEMENT,

Defendants-Respondents.

(Filed
Oct 23, 1989)

Argued October 31, 1988 – Decided Oct 23 1989

Before Judges J. H. Coleman, Deighan and Baime.

On appeal from Superior Court, Chancery Division, Atlantic County and the State Casino Control Commission.

Edward N. Fitzpatrick argued the cause for appellant (Clapp & Eisenberg, Attorneys; Mr. Fitzpatrick, of counsel; Frederic S. Kessler and

Harvey C. Kaish on the brief; Mr. Kessler on the reply brief).

Gary A. Ehrlich, Deputy Attorney General, argued the cause for respondent Division of Gaming Enforcement (Cary Edwards, Attorney General of New Jersey, attorney; Anthony J. Parillo, Assistant Attorney General, of counsel; Mr. Ehrlich on the brief).

Robert J. Genatt argued the cause for respondent New Jersey Casino Control Commission (Mr. Genatt, General Counsel, of counsel and on the brief with Mark Neary, Assistant Counsel).

The opinion of the court was delivered by

DEIGHAN, J.A.D.

This case presents a difficult question concerning casino employee regulations which may infringe upon constitutional rights. Plaintiff Gloria E. Soto, an attorney and also a casino key employee, challenges statutory restrictions contained in *N.J.S.A.* 5:12-138 (§138) which prohibit a casino officer or key employee from contributing any "money or thing of value" to a candidate for public office or any party or group organized to support such candidates.

Plaintiff had requested a ruling from the Casino Control Commission, which ruled that plaintiff could continue certain voluntary political activities but could not provide free legal services to any political organization or candidate. Plaintiff also filed a declaratory judgment action in the Chancery Division challenging the constitutionality of the act. Judge Gibson, in an oral opinion, found the statute in question to be constitutional. Both matters have been consolidated for purposes of this appeal.

Based on our thorough review of the record we affirm.

The facts are not in dispute. In 1985 plaintiff was selected by the New Jersey Democratic Party to serve as a member of its Platform Resolutions Committee (Platform Committee). At the time, plaintiff was employed by Trump Casino Hotel as its associate general counsel. Plaintiff had previously been designated a casino key employee by the Casino Control Commission (Commission) and had been granted the requisite license.

At the time of her assignment to the Platform Committee, plaintiff was aware of the provisions of §138. On July 11, 1985, plaintiff informed the Commission of her assignment and requested a ruling as to whether the restrictions contained in §138 would prohibit her service on the Platform Committee.

In the interim, plaintiff became employed by the Claridge Casino Hotel as the Director of Regulatory Affairs. Plaintiff was also required to be licensed as a casino key employee for this position. The Claridge Board of Directors subsequently appointed plaintiff to the office of Vice President for Compliance and Legal Affairs. As a vice president, plaintiff is both a key employee and an officer of the Claridge.

On September 3, 1985 plaintiff requested that her application for a declaratory ruling be expanded to include a ruling on whether her personal participation in a committee of a state political party is a contribution of a "thing of value" within the proscriptions of §138. On September 10, 1985, the Commission informed plaintiff that, as requested, the scope of the hearings would be

expanded. She was also informed of the need for "more facts concerning the activities covered by [her] request."

Plaintiff did not submit the information requested by the Commission; instead, on November 4, 1986, she filed an amended petition which sought a ruling from the Commission that §138 violated the United States Constitution. On November 17, 1986, the Commission advised plaintiff that it lacked the jurisdiction and authority to entertain or resolve constitutional challenges to its enabling statutes. The Commission also advised plaintiff that it did not have sufficient facts upon which to make a ruling on plaintiff's initial application and again requested further information. Plaintiff did not respond to the Commission's request; instead, her attorney informed the Commission that plaintiff intended to file a declaratory judgment action in the Superior Court concerning the constitutionality of §138 and requested an indefinite adjournment pending the disposition of the court action.

On January 20, 1987, plaintiff filed a complaint in the Superior Court, Chancery Division, seeking a declaratory judgment that §138 was unconstitutional in that it interfered with her rights of free speech and association. She also asserted that the phrase "thing of value" rendered the statute fatally vague and overbroad. Plaintiff further contended that the statute discriminated against casino key employees in violation of the Equal Protection clause of the Fourteenth Amendment of the United States Constitution.

The Division of Gaming Enforcement (Division) and the Commission filed answers and then moved to dismiss the complaint or for summary judgment. After a hearing,

Judge Gibson, on June 8, 1987, referred the case back to the Commission and ordered the Commission to determine the scope and definition of the phrase "thing of value" as it applied to plaintiff's proposed activities. The order also denied both defendants' motions without prejudice. Judge Gibson retained jurisdiction of the constitutional issues presented by plaintiff.

On June 9, 1987, plaintiff sent a letter to the Commission to amend her November 1986 petition to include rulings on the specific types of political activities in which she intended to engage. Plaintiff indicated that she planned to participate in: (1) the Platform Resolutions Committee of the New Jersey Democratic Party; (2) the New Jersey Hispanic Democrats; (3) the "Committee of 200," and (4) the Affirmative Action Committee of the New Jersey Democratic Party. She described the purpose and function of each of the organizations and the extent and nature of her proposed activity.

Following a hearing on July 8, 1987, the Commission analyzed §138 and ruled that:

> (1) Plaintiff could serve on the Platform Resolutions Committee of the New Jersey Democratic Party since she would "not be required to provide any professional legal services" as a result of her membership.
>
> (2) Plaintiff could join the New Jersey Hispanic Democrats and could provide services incidental to her membership so long as those services did not constitute money or a "thing of value." The Commission found that plaintiff's offer of free legal service to this organization would constitute a thing of value and therefore would be in direct violation of §138.

(3) Plaintiff was barred from joining the Committee of 200, since the annual membership fee of $1,000 clearly violated §138.

(4) Plaintiff could serve on the Affirmative Action Committee of the New Jersey Democratic Party, since it "would involve only such personal services as are necessary for the Petitioner to express her views and to advocate minority representation."

The Commission and the Division then renewed their motions to dismiss or for summary judgment before Judge Gibson. On October 13, 1987, Judge Gibson delivered an oral opinion in which he found §138 to be constitutional and granted the defendants' motion to dismiss the complaint. In reaching his decision, Judge Gibson made, among others, the following findings:

> In particular, with respect to the Casino Control Act, it is this Court's conclusion that although the limitation with respect to First Amendment freedoms has been demonstrated, *the type of limitation here is of the marginal type referred to by the Supreme Court in Buckley.*[1] By that I mean that there is no limitation under this statute to Gloria Soto's ability to speak out on public issues. There is no limit on her ability to support, through her expression of views, a particular candidate, there is no limit on her ability to join and participate in a political party. Her freedom to speak, her freedom to associate in those senses have not been impacted upon by Section 138. The impact is a more limited kind.
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[1] *Buckley v. Valeo*, 424 *U.S.* 1, 96 *S.Ct.* 612, 46 *L.Ed.* 2d 659 (1976).

On the question of whether there has been a showing of a sufficiently compelling State interest in this case, I'm satisfied that there has been. *As the history of this State's public policy towards casino gambling reflects, there has been a longstanding and strong sensitivity to the evils traditionally associated with casino gambling when it is unregulated, and even when there is regulation, there is a continued sensitivity to the maintenance of the integrity of the process, and in particular, the regulatory process.*

As I pointed out earlier, when casino gambling was legalized here in New Jersey, it was only on the condition that it be strictly regulated and that the regulation that came out of it extended not only to the casinos but to the people who ran the casinos.

* * *

The Legislature recognized when it passed the Casino Control Act the limitation that the constitutional amendment carried with it and *the Legislature recognized the concentration of wealth that exists with casinos and the disproportionate weight of that wealth, and how the casinos as a group or individually can bring that to the political process. The Legislature recognized the need for maintaining the integrity of the regulatory process,* not in just some abstract way, but because the acceptability of casino gambling in the State depends on strict regulation.

An equally important fact in that process is maintaining not just the actual integrity of the regulations but the appearance of the integrity that is needed because it is with that that the public confidence will continue and how the predicate to the legalization to gambling will exist.

* * *

> Gambling is an activity rife with evil, so prepotent its mischief in terms of the public welfare and morality that it is governed directly by the Constitution itself. As expressed in the Casino Control Act, which implements the Constitution's gambling clause, *it is the pronounced policy of the State to regulate and control the casino industry with the utmost strictness to the end that public confidence and trust in the honesty and integrity of the State's regulatory machinery can be sustained.* [Emphasis added.]

On October 26, 1987, Judge Gibson entered an order dismissing the complaint. Plaintiff appealed both Judge Gibson's decision and the Commission's ruling. We consolidated the appeals.

On appeal plaintiff raises the following issues: (1) a blanket prohibition of political contributions is unconstitutional; (2) the term "thing of value" should not be defined to include voluntary professional services; (3) the Commission's definition of "thing of value" renders the statute unconstitutionally vague, and (4) §138 invidiously discriminates against plaintiff and other casino employees in violation of their right to equal protection.

I

Before embarking upon a discussion of the issues involved, it might be well to discuss the right to engage in political activity, as that right is protected by the First Amendment of the United States Constitution. To begin with, "[i]t goes without saying that our system of government is predicated upon the premise that every citizen shall have the right to engage in political activity. It is a

basic freedom enshrined in the First Amendment." *In re Gaulkin*, 69 *N.J.* 185, 191 (1976) (citing *Sweezy v. New Hampshire*, 354 *U.S.* 234, 250-251, 77 *S.Ct.* 1203, 1212, 1 *L.Ed.*2d 1311, 1325 (1957) reh. den. 355 *U.S.* 852, 78 *S.Ct.* 7, 2 *L.Ed.*2d 61 (1957); *De Jonge v. Oregon*, 299 *U.S.* 353, 364, 57 *S.Ct.* 255, 260, 81 *L.Ed.* 278, 283-284 (1937)). Political speech occupies a preferred position in our system of constitutionally-protected interests. *See Murdock v. Pennsylvania*, 319 *U.S.* 105, 115, 63 *S.Ct.* 870, 876, 87 *L.Ed.* 1292, 1300 (1943); *State v. Miller*, 83 *N.J.* 402, 411 (1980). The First Amendment affords the broadest protection to political expression, *Buckley v. Valeo*, 424 *U.S.* 1, 14, 96 *S.Ct.* 612, 46 *L.Ed.* 2d 659, 685 (1976), and protects political association as well. *Id.* at 15, 96 *S.Ct.* at ___, 46 *L.Ed.* 2d at 685.

State action that withholds a privilege from an individual who has engaged in a protected association infringes on the constitutionally protected interest of freedom of association which, like free speech, lies at the foundation of a free society. *In re Martin*, 90 *N.J.* 295, 325-26 (1982). Once it is determined that a state action may have the effect of curtailing the freedom to associate, the action is subject to the closest scrutiny. *Id.* at 326. A constitutional interest may be impeded by the state only if the state has a conflicting interest sufficient to justify the deterrent effect on the free exercise of the constitutionally protected right. *NAACP v. Alabama*, 357 *U.S.* 449, 463, 78 *S.Ct.* 1163, 1172, 2 *L.Ed.* 1488, 1500 (1958). The interest must be compelling. *Ibid.*

Even when the state interest is sufficiently compelling to justify the governmental limitation on constitutional rights, the intrusion must be accomplished in the

least restrictive manner possible. *See Nixon v. Adm. of General Services*, 433 *U.S.* 425, 467, 97 *S.Ct.* 2777, 2802, 53 *L.Ed.*2d 867, 906 (1977). Thus, any state interference with protected interests is permitted only if the state can demonstrate both that it possesses a sufficiently important interest and that the means chosen to achieve that interest are "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley v. Valeo*, 424 *U.S.* at 25, 96 *S.Ct.* at 637, 46 *L.Ed* 2d at 691; *Martin* 90 *N.J.* at 327. Moreover, a state statute which restricts freedom of speech must be neither vague nor overbroad. *In re Hinds*, 90 *N.J.* 604, 617-618 (1982); *accord In re Rachmiel*, 90 *N.J.* 646, 655 (1982).

An analysis of fundamental rights under our State Constitution differs from the analysis of those rights under the United States Constitution. *Greenberg v. Kimmelman*, 99 *N.J.* 552, 567 (1985). New Jersey has developed a balancing test which is used in analyzing claims based on Article 1, Paragraph 1 of our State Constitution. *Ibid.* In applying this test, our courts have considered the nature of the affected right, the extent to which the governmental restriction intrudes upon the right and the public need for the restriction. *Ibid.* Our courts continue to look to both the federal courts and other state courts for assistance in constitutional analysis. *Id.* at 568.

In summary, in order to evaluate whether §138 infringes upon plaintiff's First Amendment rights, we must determine whether there is a compelling state interest to justify the infringement on fundamental rights. If so, we must then determine whether the legislative restriction is sufficiently narrow and rationally related to the interest.

In order to determine whether the statute is either overbroad or vague, it is necessary to examine the purpose and need for the legislation, as well as the status of the casino industry in New Jersey.

II

Plaintiff's initial contention is that "[a] blanket prohibition of political contributions is unconstitutional." She argues that "[w]hile limitations upon political contributions by individuals have been held permissible," citing *Buckley v. Valeo*, "there is no legitimate basis for prohibiting such contributions entirely."

Plaintiff maintains that a blanket prohibition on political contributions by casino employees is an impermissible infringement upon her First Amendment right of free speech. She contends that the trial court "erred by concluding that 'the type of limitation here is of the marginal type referred to in *Buckley*'." Plaintiff then argues that "as long as the individual is allowed to engage in the 'general expression of support' which a contribution represents, the quantity of the contribution is less important. A limitation 'permits the symbolic expression of support evidenced by a contribution,' *but a total prohibition does not.*" (Emphasis in original.)

Buckley v. Valeo, involved a series of challenges to the Federal Election Campaign Act of 1971, which established the system of public financing for Presidential election campaigns. One of the challenged statutes, 18 *U.S.C.* § 608(b) (1) (now 2 *U.S.C.* § 441a(1)(A)) established a $1,000 limit on political contributions by individuals or groups to any single candidate for a federal elective

office. *See* 424 *U.S.* at 189, 96 S.Ct. at ___, 46 *L.Ed.* 2d at 783.

In addressing the challenge to the statute, the Court first outlined the protections offered to political activity under the First Amendment. The Court observed that "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. . . . The First Amendment affords the broadest protection to such political expression." 424 *U.S.* at 14, 96 *S.Ct.* at ___, 46 *L.Ed.*2d at 685.

The Court also noted that the First Amendment protects political association as well as political expression. 424 *U.S.* at 15, 96 *S.Ct.* at ___, 46 *L.Ed.*2d at 685.

The Court contrasted the limitation on contributions with limitations on expenditures, finding the latter to represent substantial "restraints on the quantity and diversity of political speech." 424 *U.S.* at 19, 96 *S.Ct.* at ___, 46 *L.Ed.*2d at 688. In noting the differences between the two, the Court explained why the limitation on contributions was not violative of the First Amendment:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.
>
> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly

> with the size of his contribution, since the expression rests solely on the undifferentiated, *symbolic* act of contributing. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the *symbolic* expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. [424 *U.S.* at 20-21, 96 *S.Ct.* at ___, 46 *L.Ed.*2d at 688-689 (emphasis added).]

The Court tempered the First Amendment right to political association and stated that "[e]ven a 'significant interference with protected rights of political association, may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25, 96 *S.Ct.* at ___, 46 *L.Ed.* 2d at 691 (citations omitted). *See also California Medical Ass'n. v. Federal Election Comm'n.* 453 *U.S.* 182, 196 n.16, 101 *S.Ct.* 2712, 2722 n. 16, 69 *L.Ed.*2d 567, 580 n.16 (1981) (Political contributions are an "attenuated form of speech [which do] not resemble the direct political advocacy to which [the Court] in *Buckley* accorded substantial constitutional protection.") The Court then held that the governmental interest in preventing the corruption, or appearance of corruption, which could accompany unlimited financial contributions justified the restrictions on contributions. 424 *U.S.* at 25-29, 96 *S.Ct.* at ___, 46 *L.Ed.* 2d at 691-694.

The need for the type of restriction embodied in §138 was identified by the State Commission of Investigation

(SCI) in its April 1977 report to the Governor and Legislature, entitled *Report and Recommendations on Casino Gambling*. The report noted that,

> contributions by casino licensees, both corporate and individual, give the *appearance* of attempting to "buy" political influence and favoritism and in fact have the very real potential for causing such favoritism to occur. . . . The State Commission of Investigation is inclined to recommend[] an absolute prohibition against any licensee of the state regulatory authority, whether it be an individual, corporation or so-called "holding company[,]" from making a contribution to any political candidate, party or campaign organization within this State, either directly or indirectly. [State Commission of Investigation, *Report and Recommendations on Casino Gambling* 4-I - 5-I (1977).]

The report acknowledged the United States Supreme Court decision in *Buckley v. Valeo* and expressed concern that "an absolute prohibition may raise serious constitutional questions." *Id.* at 5-I. Nevertheless, the SCI report suggested flat prohibitions against political contributions by casino employees:

> Accordingly, the S.C.I. recommends that at the very least, the Legislature should impose strict limitations on the amounts licensees could contribute to political activities. It further suggests that the Legislature closely examine this issue to determine whether flat prohibitions would be permissible. [*Id.* at 6-I.]

Thus, the same fear of corruption of the political process relied upon by the Supreme Court in *Buckley* is equally present in this case. This fear of political corruption, or even the appearance of it, runs throughout the

report by the SCI and is reflected in the statutory and regulatory framework which governs every aspect of casino operations.

The need for this scope of statutory and regulatory coverage was summarized by Justice Handler in *Knight v. Margate*, 86 *N.J.* 374 (1981):

> Gambling is an activity rife with evil, so prepotent its mischief in terms of the public welfare and morality that it is governed directly by the Constitution itself. *N.J. Const.* (1947), Art IV, § 7, par. 2.[2] As expressed in the Casino Control Act, which implements the Constitution's gambling clause, it is the pronounced policy of this State to regulate and control the casino industry with the utmost strictness to the end that public confidence and trust in the honesty and integrity of the State's regulatory machinery can be sustained. [86 *N.J.* at 392 (citation omitted) (footnote added).]

Accord, Greenberg, 99 *N.J.* at 560-61; *see In re Boardwalk Regency Casino License application*, 180 *N.J. Super.* 324, 341-42 (App.Div. 1981), aff'd as mod. 90 *N.J.* 361 (1982) app. dism. 459 *U.S.* 1981, 74 *L.Ed.* 2d 927, 103 *S.Ct.* 562 (1982). As our Supreme Court has stated, our courts are "concerned not only with impropriety, but also with its appearance, which is always more subtle than impropriety itself." *Greenberg* 99 *N.J.* at 561.

In order to fully understand the concern we have here, it is important to note the relationship between the governmental process and political parties. A "political

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[2] The genesis of our casino industry was an amendment to *N.J. Const.* (1947), art.4, § 7, ¶2 which was authorized by a referendum in 1976.

party" may be generally defined as an unincorporated association of persons which sponsors certain ideas of government or maintains certain political principles or beliefs in the public policies of the government. It is formed for the purpose of urging the adoption and execution of such principles in governmental affairs through officers of like beliefs. *Rogers, et al v. State Com. of Republican Party, et al*, 96 *N.J. Super.* 265, 271 (Law Div. 1967); 25 *Am. Jur.* 2d, *Elections*, § 116 at 800.

Political parties are institutions of very great importance under our form of government. They are, in fact, the effective instrumentalities by which the will of the people may be made vocal, and the enactment of laws in accordance therewith made possible. So potent have they become in administering the affairs of government that they are now regarded as inseparable from, if not essential to, a republican form of government, *Rogers* 96 *N.J. Super.* at 801, and as a necessary adjunct to representative government. *Wene v. Meyner*, 13 *N.J.* 185, 193 (1953). They are imbued with a quasi-governmental character. *Tribe, American Constitutional Law*, § 13-23 at 1118 (2 ed. 1988).

Political parties have come to be regarded by the courts as governmental agencies through which the sovereign power is exercised by the people. The conception that a political party is merely a private association of citizens has been generally abandoned. In most jurisdictions the state has seen fit to declare that political parties shall be, as to their mode of holding conventions and nominating candidates for public office, regarded as public bodies whose methods are to be controlled by the state. 25 *Am. Jur. supra*, at 801-802. *See also, Tribe, supra*, § 13-23 at 1121.

The compelling state interest in maintaining the integrity of political parties and organizations from undue influence by those individuals who, by the very nature of their employment, play a pivotal role in the casino industry justifies upholding the restrictions found in §138.

III

In challenging the validity of §138, plaintiff argues that a limitation on contributions, rather than an outright prohibition, should be the method utilized to regulate the political activity of casino key employees. In effect, this requires a determination as to whether there is available a less restrictive means of regulation which would achieve the State's interest in preventing the appearance or occurrence of political corruption.

As pointed out by the United States Supreme Court, we will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *FEC v. National Right to Work Committee*, 459 *U.S.* 197, 210, 103 *S.Ct.* 552, 561, 74 *L.Ed.*2d 364, 377 (1982). As stated in *Federal Election Commission v. National Conservative Political Action Comm.*, 470 *U.S.* 480, 497, 105 *S.Ct.* 1459, 1468, 84 *L.Ed.*2d 455, 470 (1985)

> Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political favors.

"[D]ispelling the *appearance* of such illicit impact on [elected officials] from their large . . . contributors is of almost

equal concern." *Tribe, supra*, § 13-28 at 1137 (citing *Buckley*, 424 *U.S.* at 27).

Given the acknowledged vulnerability of the casino industry to organized crime and the compelling interest in maintaining the public trust, not only in the casino industry but also the governmental process which so closely regulates it, *Greenberg*, 99 *N.J.* at 574, there is no viable alternative available to prevent the appearance of, or actual, corruption of the political process in New Jersey. As noted by Justice Pollock in *Greenberg* "[a] public perception that any improper influence has infiltrated the [regulatory and judicial] processes, however slightly, would undermine the trust that is essential to continued confidence in the industry and, what is more important, in state government." *Ibid.*

This type of prohibition was upheld by the Illinois Supreme Court in *Schiller Park Colonial Inn, Inc. v. Berz*, 63 *Ill.*2d 499, 349 *N.E.*2d 61 (1976) (*Schiller Park*), which was decided after *Buckley v. Valeo*. In *Schiller Park* a group of liquor licensees challenged the constitutionality of a state statute which made it unlawful for any liquor licensee – or officer, associate, agent, representative or employee of a liquor licensee – to contribute directly or indirectly to a political party or candidate. *Ill. Rev. Stat.* 1973, ch. 43, para. 132. The Supreme Court of Illinois held that in view of the substantial state interest involved, and the fact that the statute imposed relatively minor limitations upon licensees' constitutional rights, the statute did not violate rights of free speech or association; nor did it violate the licensees' right to due process or equal protection. 349 *N.E.* at 67-68.

In upholding this statute on federal and state constitutional law grounds, the Illinois Supreme Court stated that:

> The General Assembly may reasonably have believed, however, that its efforts to further the relevant State interests would have been much less effective if only contributions above a certain amount were prohibited. . . . We therefore hold that section 12a is not rendered unconstitutional by the fact that it prohibits small political contributions as well as large contributions. [*Id.* at 66.]

The Court held that the Legislature's decision to prohibit contribution by liquor licensees to political parties as well as to individual candidates was not overly broad, stating:

> A political party, a local party organization or individuals who participate in policy making within a party organization may have influence or power which could be used to affect various actions concerning the liquor industry. [*Ibid.*]

In upholding the prohibition of contributions to all candidates, and not merely those whose potential duties have some relationship to the regulation of liquor, the court concluded:

> The nature of our political system and past history suggest that political officials or public officers may wield powers or possess influence beyond the powers and influence inherent in their official duties. In attempting to prevent liquor licensees from obtaining influence in the area of liquor regulation, therefore, the legislature acted reasonably in proscribing the giving of campaign contributions by liquor licensees to any candidate. [*Id.* at 67.]

The concerns expressed by the court in *Schiller Park* are equally applicable to casino gaming and the potential influence it could wield in state and local government.[3]

IV

Plaintiff contends that §138 "is overbroad insofar as it prohibits contributions to any and every political candidate and committee in this State, regardless of whether the particular office or committee has anything to do with casino regulation. The statute, by its terms extends even to county and local offices outside of Atlantic City." She also contends that the term "thing of value" in §138 is

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[3] The parallel between the liquor, horse racing and casino industries was noted by Judge Fritz in *In re Boardwalk Regency Casino License Application*:

> There is nothing inherently wrong with sensitive, strict regulation. It has for many years been exercised in this State in certain industries. Liquor, with "its inherent evils," has been dealt with as "a subject apart." *Grand Union Co. v. Sills*, 43 *N.J.* 390, 398 (1964). The legislative power to regulate such a "nonessential and inherently dangerous commodity," as a wholly constitutional expression of concern for public health, safety, morals or general welfare, has been said to be almost without limit. *Id.* at 403-404. Horse racing, with attendant legalized gambling, "strongly affected by a public interest," has been held to be a "highly appropriate" subject for close regulatory supervision, *Niglio v. N.J. Racing Comm'n.* 158 *N.J. Super.* 182, 188 (App. Div.) (1978). We see every reason, including those expressed in *N.J.S.A.* 5:12-1b, for legalized casino gaming to take its deserved place among those industries. [180 *N.J. Super.* at 341.]

unconstitutionally vague and that the term should not be defined to include voluntary professional services. She argues that "it is clear that when the Legislature defined the term 'thing of value' in relation to political contributions, it chose not to include voluntary personal services."

We disagree.

The concepts of vagueness and overbreadth as applied to constitutionally permissive limits are somewhat similar, yet there are important distinctions to be made between them. *In re Hinds*, 90 *N.J.* at 617. A prohibition upon speech may be void for vagueness if it is not clearly defined. *Ibid.* The "void for vagueness" doctrine involves procedural due process considerations of fair notice and adequate warning. *Id.* at 618.

Prohibitions upon speech can also be void if they are broad and far reaching in scope – when "in [their] reach [they] prohibit[] constitutionally protected conduct." *Ibid.* (citing *Grayned v. City of Rockford*, 408 *U.S.* 104, 114, 92 *S.Ct.* 2294, 2302, 33 *L.Ed.*2d 222, 231 (1972)). Overbreadth involves substantive due process considerations concerning excessive governmental intrusion into protected areas. *Id.* at 618.

Dealing first with the overbreath doctrine, in order to mount a successful overbreadth challenge there must be a strong showing that the statute's deterrent effect on legitimate expression is real and substantial. *N.J. Chamber of Commerce v. N.J. Election Law Enforcement Comm.*, 82 *N.J.* 57, 66 (1980). The prospect of first amendment harm must be real, not fanciful. *Anderson v. Sills*, 56 *N.J.* 210, 220 (1970); *accord N.J.Chamber of Commerce*, 82 *N.J.* at 66.

In determining whether a statute is overbroad, the question is whether the enactment reaches a substantial amount of constitutionally protected conduct. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 *U.S.* 489, 494, 102 *S.Ct.* 1186, 1191, 71 *L.Ed.*2d 362, 369 (1982), reh'g denied 456 *U.S.* 950, 102 *S.Ct.* 2023, 72 *L.Ed.*2d 476 (1982). The standard is not whether the law's meaning is sufficiently clear, but whether the reach of the law extends too far in fulfilling the state's interest. *Town Tobacconist v. Kimmelman*, 94 *N.J.* 85, 125 n. 21 (1983).

We are satisfied that §138 has been narrowly drawn and precisely tailored to serve the compelling interest of the State. §138 is applicable only to casino key employees, who are defined as persons in a supervisory capacity or empowered to make discretionary decisions which regulate casino operations. *N.J.S.A.* 5:12-9.[4] Such a select prohibition is more than justified by the overriding interest in protecting the governmental process from the infiltration of the casino influence. As previously noted, we should not "second-guess" the Legislature's judgment. *See FEC v. National Right to Work Committee*, 459 *U.S.* at 210, 103 *S.Ct.* at ___, 74 *L.Ed.*2d at 377.

Nor do we find the statute overbroad because it prohibits contributions to any political candidate and committee within the State regardless of whether the particular office or committee has anything to do with

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[4] The Commission estimates the personnel within this classification number approximately 1450 as of April 1, 1987, which represents only 3.5% of all the employees of the casinos at that time. As of June, 1988, the Division placed the number of active casino key employee licensees at approximately 2200.

casino regulation. This argument was answered in *Schiller Park*, where the Illinois Court stated that "[i]t is difficult and probably impossible to determine precisely which officeholders will be in a position to exercise influence in the area of liquor regulation." 63 *Ill.*2d at ___, 349 *N.E.*2d at 67. As noted above, the *Shiller Park* court observed that "[t]he nature of our political system and past history suggests that political officials or public officers may wield powers or possess influence beyond the powers and influence inherent in their official duties." *Ibid.*

Plaintiff's reliance on *N.J.S.A.* 52:13D-17.2 to buttress her argument that §138 is overbroad is misplaced. That statute, as amended in 1981, prohibits virtually all state officers, employees and immediate family members from securing employment in the casino industry. Only certain local government offices were not included in the statute's broad coverage. *See N.J.S.A.* 52:13D-17.2(a). Clearly, §138 was designed to prevent political corruption or its appearance; since the statute applies to all governmental offices which could come in contact with the casino industry, it works toward the same goal as *N.J.S.A* 52:13D-17.2.

We are convinced that although there has been a showing that the statute's deterrent effect on legitimate expression is real and substantial, the sweep of the legislation will not impermissibly hovel the exercise of protected first amendment rights. *See N.J. Chamber of Commerce*, 82 *N.J.* at 66.

In regards to plaintiff's argument that the term "thing of value" should not be defined to include voluntary professional services, we note that the Commission

made a distinction between personal services incidental to ordinary committee membership and professional services. The Commission ruled that:

> [T]here is no reason to believe that Section 138 was ever intended to reach participation for the purpose of expressing ideas and engaging in debate on issues or candidates. Such activities do not involve the transfer or provision of a tangibly valuable service or commodity which might invoke a sense of obligation to the contributor by a political candidate. If the Legislature had intended to prohibit membership in political organizations, it could have done so very simply. As noted by the Division in its letter response, nothing in Section 138 by its terms prevents the petitioner from being an active member of any political party or committee thereof.

The Commission then made a distinction between political participation and the contribution of professional services:

> An attorney's services are not valued based on the personal ideological beliefs of the attorney but rather on the legal expertise and professional advocacy skills which he or she possesses. Professional legal services, provided greatis [sic] by a committee member who is an attorney, can readily be replaced, at a price, by the professional services of another attorney. No distinction can validly be drawn between providing money to a political organization to pay for the professional services of an attorney, and providing professional legal [s]ervices directly without requiring payment for them.

The Commission ruled that plaintiff could join the New Jersey Hispanic Democrats and that her "personal

non-professional service in the [organization] would not violate §138 of the Act if such service can be rendered independently of any barred professional services." The Commission found that plaintiff's offer of free legal service to this organization would be in direct violation of §138 as constituting a "thing of value." We agree with this finding.

V

Plaintiff next argues that if the definition of a "thing of value" is to include "professional services" the statute is unconstitutionally vague. Plaintiff then concludes that:

> The term "professional services" is susceptible to so many and varied definitions that "men of common intelligence must necessarily guess at its meaning." *Broadrick v. Oklahoma*, 413 *U.S.* 601, 607, 93 *S.Ct.* 2908, 37 *L.Ed.*2d 830 (1973); *Connally v General Construction Co.* 269 *U.S.* 385, 391, 46 *S.Ct.* 126, 70 *L.Ed.* 322 (1926). It fails to set out "explicit standards" for those who must apply it or provide "fair warning" to those to whom it applies. *See Grayned v. City of Rockford*, 408 *U.S.* 104, 108-109, 92 *S.Ct.* 2294, 33 *L.Ed.*2d 222 (1972). The statute, as interpreted by the Commission, is therefore unconstitutionally vague.

A statute is void for vagueness if it is couched in terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Coates v. Cincinnati*, 402 *U.S.* 611, 614, 91 *S.Ct.* 1686, 29 *L.Ed.* 2d 214, 217 (1971); *accord State v. Lashinsky*, 81 *N.J.* 1,17-18 (1979); *Matter of Hotel and Restaurant Emp. and Bartend.*, 203 *N.J. Super.* 297, 328 (App. Div. 1985) certif. den. 102 *N.J.* 352 (1985). As long as procedural and

judicial safeguards are available, however, the fact that certain statutory phrases are not "impeccable specimens of draftsmanship does not impugn their legality." *In re Boardwalk Regency Casino License Application*, 180 *N.J. Super.* at 345 (citation omitted).

In *Grayned v. City of Rockford*, 408 *U.S.* 104, 92 *S.Ct.* 2294, 33 *L.Ed.*2d 222 (1972), the Court reviewed the values that are offended by vague laws and determined that there is a two-fold purpose in requiring specific legislation. *See* 408 *U.S.* at 108, 92 *S.Ct.* at ___, 33 *L.Ed.* 2d at 227. The Court first held that laws must provide notice as to the conduct prescribed, so that people of ordinary intelligence have a reasonable opportunity to know what is prohibited and can act accordingly. *Ibid.* Secondly, the Court mandated that laws must provide explicit standards for those who apply them in order to avoid arbitrary and discriminatory enforcement. *Ibid.*

Vagueness is a matter of degree and context. We recognize that "there are limitations in the English language with respect to being both specific and manageably brief," *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 *U.S.* 548, 578-579, 93 *S.Ct.* 2880, 2897, 37 *L.Ed.*2d 796, 816 (1973), and that "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 *U.S.* at 110, 92 *S.Ct.* at 2300, 33 *L.Ed.* 2d at 228-229 (footnote omitted). Moreover, we recognize that there "are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision." *Smith v. Goguen*, 415 *U.S.* 566, 581, 94 *S.Ct.* 1242, 1251, 39 *L.Ed.*2d 605, 616 (1974).

The term "thing of value" is a very elastic phrase and is used in many settings. This is evidenced by the fact that in 41A *Words and Phrases* 212 (West 1965) there are 37 citations for the term "thing of value;" the 1988 supplement for this volume contains an additional 39 citations. In addition, a computer analysis revealed that this phrase appears in at least 42 New Jersey statutes.[5] Surely, a phrase with such flexible and common-place usage cannot be said to be vague in and of itself, but must be given a common-sense interpretation in context with the statute and the manner in which it is used.

As a New York court stated in *People v. Hochberg*, 87 *Misc.*2d 1024, 386 *N.Y. Supp.*2d 740, 746 (Sup. Ct. Albany Cty. 1976) aff'd 404 *N.Y. Supp.* 2d 161, 62 *A.*2d 239 (N.Y. App. Div. 1978):

> It seems clear that the Legislature used these terms for the very purpose of extending the effect of the statute beyond the tangible items of money or property to the intangible rewards

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[5] The phrase "thing of value" appears in the following statutes: *N.J.S.A* 2A:23-4; *N.J.S.A.* 2C: 29-4; *N.J.S.A.* 4:13-45; *N.J.S.A.* 5:1-1; *N.J.S.A.* 5:12-45; *N.J.S.A.* 5:12-125; *N.J.S.A.* 5:12-138; *N.J.S.A.* 8A:9-4; *N.J.S.A.* 10:5-5; *N.J.S.A.* 17:3B-5; *N.J.S.A.* 17:11A-46; *N.J.S.A.* 17:11B-14; *N.J.S.A.* 17:16C-70; *N.J.S.A.* 17:45-17; *N.J.S.A.* 17:48-15; *N.J.S.A.* 17:48A-22; *N.J.S.A.* 18A:14-89; *N.J.S.A.* 18A:14-90; *N.J.S.A.* 18A:18B-6; *N.J.S.A* 18A:64A-25.38; *N.J.S.A.* 19:29-1; *N.J.S.A.* 19:34-25; *N.J.S.A.* 19:34-41; *N.J.S.A.* 19:34-35; *N.J.S.A.* 19:44A-3; *N.J.S.A* 19:44A-11; *N.J.S.A.* 19:44A-20; *N.J.S.A.* 19:44A-29; *N.J.S.A.* 19:44B-1; *N.J.S.A.* 32:11D-94; *N.J.S.A.* 32:29-27; *N.J.S.A.* 34:1-1; *N.J.S.A.* 39:6A-15; *N.J.S.A.* 45:15-3; *N.J.S.A.* 46:15-5; *N.J.S.A.* 52:90-13; *N.J.S.A.* 52:13C-29; *N.J.S.A.* 52:13D-14; *N.J.S.A.* 52:13D-16; *N.J.S.A.* 52:13D-23; *N.J.S.A.* 52:13D-24 and *N.J.S.A.* 54:3-22.

> encompassed in phrases such as "thing of value" and "thing . . . of personal advantage." Since the common meaning of these terms is well known and defined, their use when read in context with the rest of the statute does not make the statute unconstitutionally vague.

We hold that the term "thing of value" in §138 of the Casino Control Act is not unconstitutionally vague.

VI

Plaintiff next contends that the Commission's definition of "professional service" as a "thing of value" "raises more questions than it answers." Plaintiff conjures up a series of irrelevant hypothetical questions as strawmen to support her argument.

The term "professional services" is a generic term. It could apply to any number of professions and its application is determined on an *ad hoc* basis. For instance, in *Autotote Limited v. N.J. Sports & Exposition Authority*, 85 *N.J.* 363 (1981) the Supreme Court, relative to a bidding statute, described the integration of a sophisticated computer system and other services of such a technical and scientific nature as "professional services." *Id.* at 371. In *Burlington Tp. v. Middle Dep't. Inspection Agency*, 175 *N.J. Super.* 624 (Law Div. 1980), the court was called upon to determine whether bidding was required for an electric inspection contract since under *N.J.S.A* 40A:11-5(1) (a)(i) bidding is not required for professional services. The court held that electrical inspection and enforcement services are not professional services. *Id.* at 633. The court analyzed *N.J.S.A.* 40A:11-2(6), which defines "professional services," and noted that there were three components

for qualification as a "professional service,": (1) the services are to be rendered or performed by a person authorized by law to practice a recognized profession; (2) that person's practice is regulated by law and (3) the performance of the services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study, as distinguished from general academic instruction or apprenticeship and training. *Id.* at 630-631.

It is clear that the term "professional services" is an all-inclusive term which covers such professions as auditing, accounting, engineering and other disciplines. Thus, it would not be feasible to lay down standards or guidelines for every profession which may be involved in the casino industry.

Here, of course, we are concerned with plaintiff's profession as an attorney. "The practice of law is not subject to precise definition. It is not confined to litigation but instead often encompasses 'legal activities in many non-litigious fields which entail specialized knowledge and ability'." *Application of New Jersey Society of CPAs*, 102 *N.J.* 231, 236 (1986) (citations omitted). *New Jersey Bar Ass'n. v. Northern N.J. Mtge. Associates*, 32 *N.J.* 430, 437 (1960), accord, *N.J. State Bar Ass'n. v. N.J. Ass'n of Realty Bds.*, 93 *N.J.* 470, 473 supplemented 94 *N.J.* 449 (1983); *Auerbacher v. Wood*, 139 *N.J. Eq.* 599 (Ch. 1947), aff'd 142 *N.J. Eq.* 484, 485 (E. & A. 1948) (what constitutes the practice of law does not always lend itself to a precise description). As stated in *Rhode Island Bar Ass'n v. Lesser*, 68 *R.I.* 14, 26 *A.*2d 6 (1942), "the practice of law, though difficult to define precisely, [is] understood to embrace in general all advice to clients and all action taken for them

in matters connected with the law." 26 *A.*2d at 7. *See also State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 *Ariz.* 76, 366 *P.*2d 1, 8-9, 14 (1961), mod. o.g. 91 *Ariz.* 293, 371 *P.*2d 1020 (1962) ("practice of law" may not be subject of exhaustive definition but consists of those acts, whether performed in court or law office, which lawyers customarily have carried on from day to day through centuries).

Here, plaintiff seeks to invalidate the Commission's ruling prohibiting her from performing "professional services" on the basis that the term is vague and therefore unconstitutional. In effect she seeks to have the undefinable specifically defined.

As stated in *In re Suspension of DeMarco*, 83 *N.J.* 25 (1980), in connection with a statute regulating physicians:

> The question ultimately is one of fairness, given the statute and its provisions, and given the situation of the defendant. Should he have understood that his conduct was proscribed, should he have understood that the penalty about to be imposed was the sanction intended by the Legislature? The test is whether the statute gives a person of ordinary intelligence fair notice that his conduct is forbidden and punishable by certain penalties. That test, however, does not consist of a linguistic analysis conducted in a vacuum. It includes not simply the language of the provision itself, but related provisions as well, and especially the reality to which the provision is to be applied. The test here is whether a *physician* of ordinary intelligence would have understood, and would have been given fair notice by virtue of these provisions, that his conduct rendered him liable

> to a $200 penalty as to each patient. [*Id* at 37 (emphasis in original).]

Accord, In re Boardwalk Regency Casino License Application, 180 *N.J. Super.* at 346. Here the test is whether an *attorney* of ordinary intelligence would have understood, and therefore would have been given fair notice, that she was providing legal services gratuitously. We hold that the guidelines concerning the practice of law, though unspecified, sufficiently gave plaintiff fair notice of those activities which would be construed as legal services.

VII

Lastly, plaintiff contends that her right to equal protection has been violated. She argues that by "singling out plaintiff and others in the casino industry [and prohibiting them from making contributions], the statute violates their right to equal protection" as guaranteed by the Fourteenth Amendment to the United States Constitution, as well as by the New Jersey Constitution. Simply stated, she contends that the Fourteenth Amendment "requires that all persons similarly situated be treated alike."

She notes that the liquor industry with its "inherent evils" has been dealt with as "a subject apart," citing *Grand Union Co. v. Sills*, 43 *N.J.* 390, 398 (1964) and that horse racing, which like casino gambling was authorized in this State by a constitutional amendment, is "strongly affected by a public interest" and is a "highly appropriate" subject for close regulatory supervision, citing *Niglio v. N.J. Racing Commission*, 158 *N.J. Super.* 182, 188 (App. Div. 1978). She then argues that despite these characteristics, which are similar to characteristics of the casino

industry, individuals in the liquor and horse racing business "are not prohibited from making political contributions. Plaintiff states that "casino gambling is not unique in any significant respect" and submits "that there is no 'compelling state interest' so unique to the casino industry as to permit casino employees to be singled out for disparate treatment and be deprived of their fundamental rights under the First Amendment."

These arguments are categorically rejected. It has been legislatively and judicially recognized that crime and corruption are inherent in the casino industry and that casino gambling is unique.

In *Dunn v. Blumstein*, 405 *U.S.* 330, 92 *S.Ct.* 995, 31 *L.Ed.* 2d 274 (1972) the Supreme Court set forth guidelines to determine whether the Equal Protection Clause has been violated:

> To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. [405 *U.S.* at 335, 92 *S.Ct.* at 999, 31 *L.Ed.* 2d at 280 (citation omitted).]

As explained by the New Jersey Supreme Court, federal equal protection analysis involves different levels of review:

> If a fundamental right or suspect class is involved, the legislative classification is subject to strict scrutiny. To justify the restriction a state must establish that a compelling state interest supports the classification and that no less restrictive alternative is available. With other

> rights, however, the legislative classification need only be rationally related to a legitimate interest. [*Greenberg*, 99 *N.J.* at 564 (citations omitted).]

The *Greenberg* Court further added:

> The standard of review varies, furthermore, with the effect of the governmental regulation upon the affected right. When the effect on a right, even a right that is fundamental, is indirect or insubstantial, the Court has applied the rational basis test and upheld a legislative classification. [*Id.* at 565].

Here, it has been demonstrated that §138 does not directly affect one's free speech since "[a] limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication." *Buckley*, 424 *U.S.* at 21, 96 *S.Ct.* at ___, 46 *L.Ed.* 2d at 689. Since §138 at most indirectly or insubstantially affects a fundamental right, the correct test under *Greenberg* is the rational basis test.

In addition, the character of the classification, *i.e.*, casino licensees, owners and managers, is not based on any "suspect" criterion. §138 draws a distinction between persons based solely upon whether they serve as officers or high level employees of a casino. Thus, on this basis also, the classification in §138 need only be rationally related to a legitimate interest.

The application of §138's prohibition to casinos and their high level personnel is rationally related to the legitimate state interest in preventing political corruption, or the appearance of political corruption, on the part of the casino industry. However, even if §138 were subject to the strict scrutiny test, it would be upheld under the

three factors established by the United States Supreme Court in *Dunn v. Blumstein.*

The prohibition is also valid under the balancing test applied by the New Jersey Supreme Court under our State constitution. This test considers the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction. *Greenberg*, 99 *N.J.* at 567.

Gambling has a substantial impact upon the public welfare and morals. *See Knight v. Margate*, 86 *N.J.* at 392. It is so extraordinarily sensitive and of such basic interest to New Jersey and its citizens that it is governed directly by the State constitution, and specific forms of gambling are limited exceptions to the general prohibition. *O'Brien and Flaherty*, "Regulation of the Atlantic City Casino Industry and Attempts to Control its Infiltration by Organized Crime," 16 *Rutgers L. J.* 721, 722 (1985). The adoption of the constitutional amendment by referendum came only after the public was repeatedly assured that New Jersey would strongly regulate casinos, that organized crime would not be allowed to infiltrate the industry in any form, that operating controls would be stringent and that only those persons of highest character, integrity and competence would be allowed to participate in casino operations. *Id.* at 723. This stringent control is predicated on the concept that gambling is an activity which has been traditionally associated with criminality and misconduct. *Ibid.* Even when conducted in a legalized form, it attracts improper influence and is potentially harmful to the public. *Ibid.*

In conclusion, a limitation on the amount of contribution to a candidate for public office or any party or group organized to support such candidates involves little direct restraint on political contribution. *Buckley*, 424 *U.S.* at 21, 96 *S.Ct.* at ___, 46 *L.Ed.* 2d at 689. Nevertheless, "[e]ven a 'significant interference with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25, 96 *S.Ct.* at ___, 46 *L.Ed.*2d at 691.

Since it is acknowledged that gambling "is an activity rife with evil" to the extent that it is governed directly by the constitution of New Jersey, *Knight v. Margate*, 86 *N.J.* at 392, it is the "pronounced policy of this State to regulate and control the casino industry with the utmost strictness" in order to reinsure that "public confidence and trust in the honesty and integrity of the State's regulatory machinery can be sustained." *Ibid.* In order to fulfill this obligation the legislative power to regulate such a " 'nonessential and inherently dangerous commodity', as a wholly constitutional expression of concern for public health, safety, morals or general welfare, has been said to be almost without limit." *Grand Union Co. v. Sills*, 43 *N.J.* 390, 403-404 (2964); accord, *In re Boardwalk Regency Casino License Application*, 180 *N.J. Super.* at 341.

We have noted that political parties are an integral part of the governmental process and imbued with quasi-governmental character, *See ante* at 16, and as such, their activities are controlled by the State. A political party, a local party organization or individuals who participate in policy making within a party organization may have

influence or power which could be used to affect various actions concerning the casino industry. See *Schiller Park*, 63 *Ill.*2d at ___, 349 *N.E.*2d at 66.

In conjunction with this, we have heretofore pointed out that the courts will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *See ante* at 17. Here, the legislature has reasonably believed that "to further the relative State interest would have been much less effective if only contributions above a certain amount were prohibited." *Schiller Park*, 63 *Ill.*2d at ___, 349 *N.E.*2d at 66. §138 does not proscribe casino key employees from engaging in any type of "pure speech". For example, key casino employees may express their political opinions to anyone who will listen; they may announce their support for candidates or political parties; they can express their political opinions by exercising their voting rights. *Ibid.* Additionally, §138 does not prohibit the licensees from joining political parties or groups or, in the present case, from volunteering non-professional services, to those parties or groups.

Buckley approved the limitation on political contributions to the entire public at large throughout the United States whereas §138 applies to only a small percentage, approximately 3.5%, *see ante* at 23, of all the employees in the casino industry. Here, the prohibition under §138 affects a relatively small percentage of persons in the casino industry who must accept the Act's imposition of restrictions and prohibitions as a condition of their employment. *Cf. Policemen's Benev. Ass'n. of N.J. v. Washington Tp.*, 85 *F.*2d 133, 135 (3d Cir. 1988) (township's imposition of drug-testing as condition of police officers'

employment did not violate Fourth Amendment); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986) (State-imposed compulsory drug-testing as condition of employment in the horse-racing industry did not violate Fourth Amendment). "[C]ertain amenities of life, and perhaps even some legal rights, have to be sacrificed or curtailed for the larger purpose of avoiding the fact" of, or appearance of impropriety. *In re Gaulkin*, 69 *N.J.* at 199. The threat of impropriety is "particularly insidious when the concern is that casinos, with their enormous economic power, might appear to infiltrate" the governmental process. *Greenberg*, 99 *N.J.* at 561.

Affirmed.

New Jersey Statute Annotated
§ 5:12-9. "Casino key employee"

"Casino Key Employee" – Any natural person employed in the operation of a licensed casino in a supervisory capacity or empowered to make discretionary decisions which regulate casino operation, including, without limitation, pit bosses; shift bosses; credit executives; casino cashier supervisors; casino managers and assistant managers; and managers or supervisors of casino security employees; or any other natural person empowered to make discretionary decisions which regulate the management of an approved hotel, including, without limitation, hotel managers; entertainment directors; and food and beverage directors; or any other employee so designated by the Casino Control Commission for reasons consistent with the policies of this act.

New Jersey Statute Annotated
§ 5:12-38. "Principal employee"

"Principal employee" – Any employee who, by reason of remuneration or of a management, supervisory or policy-making position or such other criteria as may be established by the commission by regulation, holds or exercises such authority as shall in the judgment of the commission be sufficiently related to the operation of a licensee so as to require approval by the commission in the protection of the public interest.

New Jersey Statute Annotated
§ 5:12-120. Prohibited political contributions; penalty

Any person who makes or causes to be made a political contribution prohibited by the provisions of this act is

guilty of a misdemeanor and subject to not more than three years' imprisonment or a fine of $100,000.00 or both, and in the case of a person other than a natural person, to a fine of not more than $250,000.00.

No. 89-1670

In The

Supreme Court of the United States

October Term, 1989

GLORIA E. SOTO,

Petitioner,

v.

STATE OF NEW JERSEY, NEW JERSEY CASINO CONTROL COMMISSION AND DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT,

Respondents.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a New Jersey statute which, as an anti-corruption measure, prohibits political contributions by a small class of high-ranking casino officials unconstitutionally abridge the First Amendment rights of such officials?

2. Is the New Jersey statute unconstitutionally overbroad in prohibiting contributions by casino officials to any political organization or candidate in the State?

3. Is the New Jersey statute, as judicially construed to prohibit contributions by casino officials of money or any "thing of value" constituting a monetary substitute, unconstitutionally vague?

4. Does the application of the New Jersey statute only to officials involved in the State's casino industry deny such officials equal protection under the Fourteenth Amendment?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of New Jersey, Department of Law and Public Safety, Division of Gaming Enforcement, respectfully requests that this Court deny the petition for a writ of *certiorari* to review the judgment of the Superior Court of New Jersey, Appellate Division, in this case.

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. §1257(a) to review the judgment of the Superior Court of New Jersey, Appellate Division ("Appellate Division"), because that court is not the highest court of New Jersey in which a decision on the merits could have been had by Petitioner. Although Petitioner unsuccessfully sought *discretionary* review of the judgment of the Appellate Division by the Supreme Court of New Jersey, Petitioner failed to perfect an *appeal as of right* to the state Supreme Court which was *prima facie* available to Petitioner under the New Jersey Court Rules. Petitioner's failure to pursue all means of obtaining review by the highest appellate court in New Jersey deprives this Court of jurisdiction to review the judgment of the intermediate appellate court.

STATEMENT OF THE CASE

In 1976, the people of New Jersey amended their state Constitution to permit the legislative authorization of casino gambling within the municipality of Atlantic City. The New Jersey Legislature conducted extensive hearings and, in cooperation with the Governor, commissioned numerous studies on how best to prevent the crime and corruption which had elsewhere been associated with the casino industry. On the basis of these hearings and empirical studies, New Jersey adopted the Casino Control Act, N.J. Stat. Ann. §5:12-1 *et seq.*, a comprehensive statutory scheme that authorized casino gambling subject to a rigorous system of regulation for the

entire casino industry. *Brown v. Hotel and Restaurant Employees & Bartenders*, 468 U.S. 491, 494-495 (1984).

With regard to political contributions by casino industry licensees, the Legislature was made aware of the possibility that such contributions could lead to the fact or appearance of governmental corruption via the Report and Recommendations on Casino Gambling by the State Commission of Investigation 4I-5I (1977), which stated:

> [C]ontributions by casino licensees, both corporate and individual, give the *appearance* of attempting to "buy" political influence and favoritism and in fact have the very real potential for causing such favoritism to occur. The referendum on casino gambling itself gave rise also to this very appearance. The campaign committee formed to raise money to back casino gambling received large contributions from hotels and other persons and corporations obviously in a position directly to benefit by passage of this legislation. In at least two instances, these contributions exceeded $50,000; in several others they exceeded $5,000.
>
> This money in turn was distributed in part to the previously mentioned local public officials and employees as salaries and street money for the election campaign. The campaign committee also spent part of its funds to hold receptions at both national presidential nominating conventions. During these receptions, the committee lobbied with political figures, both office holders and non office-holders, on behalf of casino gambling.
>
> The State Commission of Investigation is inclined to recommend, an absolute prohibition against any licensee of the state regulatory authority, whether it be an individual, corporation or so-called "holding company" from making a

> contribution to any political candidate, party or campaign organization within this State, either directly or indirectly.

Responding to this warning and recommendation, the Legislature enacted N.J. Stat. Ann. §5:12-138, which prohibits casinos, casino-related companies, and high-ranking casino officials from contributing any money or thing of value to any state political candidate or party. Violation of this provision is punishable as a misdemeanor. N.J. Stat. Ann. §5:12-120.

Petitioner became subject to N.J. Stat. Ann. §5:12-138 by virtue of her position as associate general counsel of a casino hotel, which required her to be licensed as a casino key employee (Pet. 4a). Although Petitioner was not permitted by the Casino Control Commission to contribute money or professional services to certain state political parties or committees, she was permitted to be a member of such organizations and to provide such personal services as were necessary to facilitate the expression of her views (Pet. 6a-7a).

In response to Petitioner's factual presentation, three key points should be emphasized. First, N.J. Stat. Ann. §5:12-138 does not have statewide or even casino industry-wide applicability; the statute affects only the highest ranking 3.5% of the individuals employed by the casinos (Pet. 23a n.4, 37a). Second, N.J. Stat. Ann. §5:12-138 prohibits only the "undifferentiated, symbolic act of contributing," at most "only a marginal restriction upon [Petitioner's] ability to engage in free communication." *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976) (per curiam). Finally, Petitioner, like all other casino officials, remains

free under N.J. Stat. Ann. §5:12-138 to express her political opinions to anyone who will listen, to announce her support for political candidates or parties, to vote, to join political parties or groups, and to volunteer non-professional services to such parties or groups (Pet. 37a).

The full procedural history of this matter is set forth in the decision of the court below (Pet. 3a-9a).

REASONS FOR DENYING THE WRIT

1. Petitioner's failure to perfect an appeal to the Supreme Court of New Jersey from the judgment of the Appellate Division deprives this Court of jurisdiction to review the judgment of the Appellate Division.

Under 28 U.S.C. §1257(a), this Court's *certiorari* jurisdiction is restricted to "[f]inal judgments . . . rendered by the highest court of a State in which a decision could be had . . . " For sound jurisprudential reasons, this Court has held that *certiorari* will not lie to review a judgment of an intermediate appellate court where the petitioner has failed to seek consideration of such judgment by the State's highest court either by appeal as of right, *Southern Electric Co. v. Stoddard*, 269 U.S. 186, 188-190 (1925), or by petition for discretionary review, *Banks v. California*, 395 U.S. 708, 708 (1969) (per curiam). See 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure §4007 at 554 (1977); 12 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice ¶509.01 at 8-53 to 8-54 (2d ed. 1989); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice §§3.16, 3.17 (6th ed. 1986); Annotation, 61 L.Ed. 2d 944, 955-956, 957-959 (1980). Where more

than one method exists for obtaining review by the State's highest court, the petitioner must invoke all such methods or suffer dismissal of his *certiorari* petition. *Gotthilf v. Sills*, 375 U.S. 79, 79-80 (1963) (per curiam); C. Wright *et al., supra*, §4007 at 554.

Under the New Jersey Court Rules, a litigant may seek review of a judgment of the Appellate Division by filing a petition for certification, which the Supreme Court of New Jersey may grant or deny in its discretion. N.J.R. App. P. 2:2-1(b), 2:12-4, 2:12-9. The Rules also provide for an appeal as of right to the Supreme Court "in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States . . . " N.J.R. App. P. 2:2-1(a)(l). This procedure is different from and independent of certification, and requires the Supreme Court either to accept the appeal, if it deems the constitutional question substantial, or dismiss the appeal, if it does not. N.J.R. App. P. 2:12-9; *Deerfield Estates, Inc. v. Township of East Brunswick*, 60 N.J. 115, 188-121, 286 A. 2d 498, 500-501 (1972).

In this case, Petitioner requested certification of the judgment of the Appellate Division to the Supreme Court of New Jersey, which was denied (Pet. la). However, Petitioner failed to perfect an appeal as of right to the Supreme Court which was *prima facie* available to her pursuant to N.J.R. App. P. 2:2-1(a). This Court has previously declined to engage in conjecture as to what a state supreme court would do if properly requested to review a case. *Stratton v. Stratton*, 239 U.S. 55, 56-57 (1915); C. Wright *et al., supra*, §4007 at 554. But even assuming *arguendo* that the Supreme Court of New Jersey would have summarily dismissed Petitioner's appeal, such a

dismissal would still have constituted a decision on the merits. *Deerfield Estates, supra,* 60 N.J. at 118-121, 286 A. 2d at 500-501. In that event, *certiorari* would have lain to review the judgment of the New Jersey Supreme Court, not that of the Appellate Division. *R.J. Reynolds Tobacco Co. v. Durham Cty.,* 479 U.S. 130, 138-139 (1986); *Posadas de Puerto Rico Assoc. v. Tourism Co.,* 478 U.S. 328, 338 (1986).

Because Petitioner failed to utilize an available avenue of appeal to the Supreme Court of New Jersey, the Appellate Division is not the highest court of New Jersey in which a decision on the merits could be had. This Court, therefore, lacks jurisdiction to review the judgment of the Appellate Division under 28 U.S.C. §1257(a).

2. In upholding a prohibition on political contributions by officials in the strictly regulated casino industry, the Appellate Division correctly applied the First Amendment decisions of this Court.

In *Buckley v. Valeo, supra,* this Court recognized that, in contrast to political *expenditures,* political *contributions* involve only an attenuated form of protected First Amendment activity:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase

> perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor. [424 U.S. at 20-21 (footnote omitted)].

To the same effect is *California Medical Ass'n v. FEC*, 453 U.S. 182, 196 n. 16 (1981), which, in referring to political contributions, observed that "this attenuated form of speech does not resemble the direct political advocacy to which this Court in *Buckley* accorded substantial constitutional protection." The lesser constitutional shelter afforded political contributions has played a significant role in the decisions of this Court approving restrictions on such contributions. *See, e.g., FEC v. Nat'l Right To Work Committee (NRWC)*, 459 U.S. 197, 207-211 (1982); *California Medical Ass'n v. FEC, supra*, 453 U.S. at 193-199; *Buckley v. Valeo, supra*, 424 U.S. at 20-29.

Contrary to Petitioner's suggestions (Pet. 8, 13), this Court has never established any constitutional "bright line" between a *prohibition* and a *limitation* on contributions, see *Austin v. Michigan Chamber of Commerce*, 494

U.S. ___, 110 S. Ct. 1391, 1396-1401 (1990) (upholding state statute prohibiting corporations from using corporate treasury funds for independent expenditures in support of or in opposition to candidates in election for state office), or between the First Amendment rights of *corporations* and *individuals*, see *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-786 (1978) (holding that even corporations possess First Amendment rights). Indeed, in *Republican Nat'l Committee v. FEC*, 445 U.S. 955 (1980) (mem.), *aff'g* 487 F.Supp. 280 (S.D.N.Y. 1980), this Court summarily affirmed a decision upholding a campaign finance law prohibiting the receipt of private contributions by a candidate accepting public funds; the District Court had rejected the contention that the law violated the First Amendment rights of those desiring to make contributions to the candidate. 487 F.Supp. at 286-287.

The analysis employed by this Court in any case presenting a First Amendment challenge to a state law does not turn on labels, but rather involves a delicate three-part inquiry: (1) Does the law burden the exercise of political speech? (2) Does the law serve a compelling state interest? (3) Is the law narrowly tailored to achieve its goal? *See, e.g., Austin v. Michigan Chamber of Commerce. supra,* 110 S.Ct. at 1396. In this case, it is clear that the prohibition on political contributions burdens only a symbolic form of speech which does not constitute direct political advocacy. *Buckley v. Valeo, supra,* 424 U.S. at 21. It is also obvious that N.J. Stat. Ann. §5:12-138 serves an anti-corruption interest which has previously been recognized as compelling. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985).

Petitioner's only real argument, that a *limitation* on contributions would be sufficient to achieve the State's goals (Pet. 9-11), appears more factual than constitutional. The definitive response to this argument was provided by the Supreme Court of Illinois, in upholding a prohibition on political contributions by a licensee in the closely regulated liquor industry:

> We agree that it is large campaign contributions which are most likely to create a danger that liquor licensees or other individuals in the liquor business may obtain a degree of influence over public officials. The General Assembly may reasonably have believed, however, that its efforts to further the relevant State interests would have been much less effective if only contributions above a certain amount were prohibited. It is possible that a liquor licensee could circumvent a law proscribing only large contributions by financing a large number of small contributions ostensibly given by his friends and associates. Also, if many liquor licensees acted in concert and each made a small contribution to a particular candidate, it is conceivable that they could, as a group, accomplish what section 12a of the Liquor Control Act was intended to prevent. [*Schiller Park Colonial Inn., Inc. v. Berz*, 63 Ill. 2d 499, 349 N.E. 2d 61, 66 (1976)].

So too here, the New Jersey Legislature could reasonably have believed that its efforts to prevent the fact or appearance of corruption would be much less effective if casino executives could achieve by indirection what a casino could not achieve directly. And as this Court stated in *FEC v. NRWC, supra*: "[W]e [will not] second-guess a legislative determination as to the need for prophylactic

measures where corruption is the evil feared." 459 U.S. at 210.

The same principle governs Petitioner's argument that N.J. Stat. Ann. §5:12-138 is overbroad because it bans contributions by casino officials to all state candidates and political parties (Pet. 11n.3). Again, the definitive response was provided by the *Schiller Park* court in the analogous field of liquor regulation:

> It is difficult and probably impossible to determine precisely which officeholders will be in a position to exercise influence in the area of liquor regulation. The nature of our political system and past history suggests that political officials or public officers may wield powers or possess influence beyond the powers and influence inherent in their official duties. In attempting to prevent liquor licensees from obtaining influence in the area of liquor regulation, therefore, the legislature acted reasonably in proscribing the giving of campaign contributions by liquor licensees to any candidate. [349 N.E. 2d at 67].

In sum, the judgment of the Appellate Division represents nothing but a straightforward and correct application of *Buckley* and other relevant First Amendment decisions of this Court.

3. Petitioner's argument that N.J. Stat. Ann. §5:12-138 is vague in prohibiting the contribution of any "thing of value" is insubstantial and does not merit this Court's review.

N.J. Stat. Ann. §5:12-138 prohibits casino officials from directly or indirectly paying or contributing any money or "thing of value" to any political candidate or

party. As construed by the Appellate Division,* "thing of value" includes professional services – such as legal services – which would have a monetary value to the candidate or party unrelated to the political or ideological beliefs of the contributing attorney or other professional (Pet. 24a-26a). Since professional services are essentially a substitute for, and thus the equivalent of, money, a prohibition on the contribution of such services does not violate the First Amendment for the reasons stated in Point 2 above. And as interpreted by the court below, the statute sets out the prohibition in terms that a casino executive exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. See *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973).

Petitioner's vagueness argument is no more substantial when recast in terms of a First Amendment "chill." (Pet. 12). The only activity which might possibly be discouraged by the existing construction of N.J. Stat. Ann. §5:12-138 is a casino official's donation to a political candidate or party of non-professional services which that official believes, erroneously, to constitute professional services. But any casino official in doubt as to what is permissible under the law may, as Petitioner did in this case (Pet. 3a-7a), seek and obtain from the Casino Control

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*Although the Petition makes some reference to matter contained in a brief filed by the Casino Control Commission below (Pet. 12), it is clear that, in evaluating the constitutionality of N.J. Stat. Ann. § 5:12-138, this Court will consider only the construction of the statute adopted by the state courts. See *Posadas de Puerto Rico Assoc. v. Tourism Co., supra*, 478 U.S. at 339.

Commission a declaratory ruling with respect to the applicability of the statute to "any person, property or state of facts." N.J. Admin. Code tit. 19, §42-9.1. The availability of this procedure reduces any First Amendment "chill" to the vanishing point, *Martin Tractor Co. v. FEC*, 627 F. 2d 375, 384-386 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980), and cures any residual vagueness in the law, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

4. Petitioner's contention that N.J. Stat. Ann. §5:12-138 unconstitutionally discriminates against officials in the casino industry is also insubstantial and does not merit this Court's review.

In *Austin v. Michigan Chamber of Commerce, supra*, this Court demonstrated again that a state statute affecting First Amendment rights does not violate the Equal Protection Clause of the Fourteenth Amendment by distinguishing between different types of business corporations, so long as the distinction serves a compelling state interest. 110 S.Ct. at 1401-1402. This case involves only a routine application of this principle.

Under New Jersey law, the casino gaming industry is regarded as uniquely susceptible to crime and corruption. *Greenberg v. Kimmelman*, 99 N.J. 552, 560, 494 A.2d 294, 298-299 (1985); *Knight v. Margate*, 86 N.J. 374, 380-381, 431 A.2d 833, 842 (1981). Moreover, with the imprimatur of the State, casinos and their officials have accumulated enormous and concentrated economic power. *Greenberg v. Kimmelman, supra*, 99 N.J. at 561, 494 A. 2d at 299; *Matter of Casino Licensee*, 224 N.J. Super. 316, 322, 540 A. 2d 523,

526 (App. Div. 1988). Under these circumstances, our Legislature could reasonably have concluded that only the casino industry presented a danger of governmental corruption sufficiently compelling to warrant the prohibition embodied in N.J. Stat. Ann. §5:12-138.* See *Austin v. Michigan Chamber of Commerce, supra,* 110 S.Ct. at 1401-1402.

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*In this connection, the Court may note that some of the allegations arising out of the "Abscam" prosecutions in the early 1980's related to casino activities and interests. See *United States v. Williams,* 705 F. 2d 603, 623 (2d Cir.), *cert. denied,* 464 U.S. 1007 (1983); *United States v. Myers,* 692 F. 2d 823, 829-830 (2d Cir. 1982), *cert. denied,* 461 U.S. 961 (1983); *MacDonald v. Time, Inc.,* 554 F. Supp. 1053, 1053-1054 (D.N.J. 1983); *Knight v. Margate, supra,* 86 N.J. at 382n.3, 431 A.2d at 837n.3.

CONCLUSION

For the reasons set forth herein, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX

N.J.R.App. P. 2:2-1. "Appeals to the Supreme Court from Final Judgments"

> (a) As of Right. Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States . . .
>
> (b) On Certification. Appeals may be taken to the Supreme Court from final judgments on certification to the Appellate Division pursuant to R. 2:12.

N.J.R.App. P. 2:12-4. "Grounds for Certification"

> Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

N.J.R.App. P. 2:12-9. "Where Party Appeals and at the Same Time Makes Application for Certification"

> Where a party seeks certification to review a final judgment of the Appellate Division and also appeals therefrom, he shall state in the petition for certification all questions he intends to raise on the appeal. The denial of certification shall be deemed to be a summary dismissal of the appeal, and the Clerk of the Supreme Court

shall forthwith enter an order dismissing the appeal, unless the Supreme Court otherwise orders.

N.J. Admin. Code tit. 19, § 42-9.1. "Declaratory rulings"

(a) Pursuant to N.J.S.A. 52:14B-8, any interested person may request that the Commission render a declaratory ruling with respect to the applicability to any person, property or state of facts of any provision of the act or of any regulation of the Commission.

(b) A request for a declaratory ruling shall be initiated by a petition. The petition shall include the following items with specificity:

1. The nature of the request and the reasons therefor;

2. The facts and circumstances underlying the request;

3. Legal authority and argument in support of the request;

4. The remedy or result desired.

(c) If the Commission, in its discretion, decides to render a declaratory ruling, a hearing shall be afforded prior to the rendering of such a ruling.

1. Where there exists disputed issues of fact which must be resolved in order to determine the rights, duties, obligations, privileges, benefits or other legal relations of specific parties, such hearings shall be conducted in accordance with N.J.A.C. 19:42-2.

2. Where there exists no such disputed issues of fact as identified in (c)1 above, the matter shall proceed on the petition, any other papers requested of the parties, and oral argument, if permitted by the Commission.

(d) In appropriate cases, the Commission may notify persons who may be interested in or affected by the subject of the declaratory ruling. In such cases, the Commission may afford these persons an opportunity to intervene as parties or to otherwise present their views in an appropriate manner which is consistent with the rights of the parties.

No. 89-1670

In The

Supreme Court of the United States

October Term, 1989

GLORIA E. SOTO,

Petitioner,

v.

STATE OF NEW JERSEY, NEW JERSEY CASINO CONTROL COMMISSION and DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT NEW JERSEY CASINO CONTROL COMMISSION

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QUESTIONS PRESENTED

1. In order to achieve the undisputed compelling interests of closely regulating the historically troublesome casino industry, of preserving public confidence in the casino regulatory system, and of avoiding public suspicion that the electoral process and elected officials have been corrupted by casino industry funding, may the State of New Jersey ban contributions to political candidates and parties by casinos and by the top officials who direct these casinos?

2. Is the prohibition against political contributions unconstitutionally vague because it extends to contributions of a "thing of value" which, among other things, bans petitioner, an attorney, from providing uncompensated legal services to a campaign or political organization supporting candidates for election?

3. Has petitioner, a vice president of a casino company, been deprived of equal protection because officials of other less regulated and less volatile industries are not similarly prohibited from making political contributions?

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No. 89-1670

In The

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GLORIA E. SOTO,

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STATE OF NEW JERSEY, NEW JERSEY CASINO CONTROL COMMISSION and DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT,

Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT NEW JERSEY CASINO CONTROL COMMISSION

The respondent, Casino Control Commission, respectfully requests that this Court deny the petition for the writ of certiorari seeking review of the judgment of the Superior Court of New Jersey, Appellate Division, which is reported at 236 N.J. Super. 303, 565 A.2d 1088 (1989) (Petition App. 2a to 38a).

STATEMENT OF THE CASE

Petitioner challenges the constitutionality of N.J.S.A 5:12-138 ("Section 138"), which prohibits licensed casinos in New Jersey, as well as their officers, directors and other high level employees, from contributing "any money or thing of value" to candidates for public office in the State or to any committee of a political party in the State, as well as groups or associations organized in support of such candidates or political parties. Petitioner serves in the position of Vice President, Compliance & Legal Affairs, for a corporation which holds a casino license. As such, she is both an officer and a "casino key employee"[1] of the casino, and subject to the statutory prohibition.

In 1985, when petitioner was working at another casino in the State as a casino key employee, she sought the opinion of respondent, the New Jersey Casino Control Commission ("Commission"), as to whether Section 138 would prohibit her from participating as a member of the State Platform Committee of a political party. The Commission requested additional information from petitioner about the Committee and the nature of the services she would perform as a member so that it could render an informed ruling. Shortly thereafter, petitioner advised the Commission that the work of the Committee had been completed, and that "the issue of whether I can participate on this Committee appears to be moot." However, she asked the Commission to address whether Section 138 would be implicated by her participation on a political party committee or as a delegate to a state party convention.

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1. "Casino key employee" is a defined term in the Casino Control Act. It includes those who serve in a supervisory capacity or make discretionary decisions regarding the management of the casino hotel. N.J.S.A. 5:12-9 (Petition App. at 39a).

The Commission then requested petitioner to provide information on these other political activities. Petitioner failed to respond to this request. Instead, more than a year later, petitioner asked the Commission to declare Section 138 unconstitutional and therefore not applicable to *any* political activities in which she may participate.

The Commission advised petitioner that it lacked the jurisdiction to rule on the constitutionality of provisions in its enabling statute, but that it had the authority and remained ready to make a determination as to whether the activities in which she wished to participate were permitted under Section 138. The Commission again requested information about the nature of these activities so that it could make such a determination. Instead of providing the information, petitioner filed a complaint in the Chancery Division of the Superior Court of New Jersey seeking a declaratory judgment that Section 138 was unconstitutional in all of its possible applications to her.

The Chancery Judge found that a determination by the Commission of the scope and definition of "thing of value" as applied to petitioner's proposed activities would aid the court in ruling on the ultimate issues. He therefore referred the matter to the Commission for such a determination, and ordered the petitioner to provide the Commission with all information necessary for it to render its ruling. He also retained jurisdiction over the constitutional issues presented by the case.

After petitioner submitted the information describing the types of political activities in which she intended to participate, the Commission ruled that Section 138 did not prohibit her from being a member of political parties, committees, or organizations for the purpose of expressing ideas, engaging in debate on issues or candidates, or advocating the organization's objectives. However, the Commission did find that Section 138 prohibited petitioner

from being a member of a political organization which required an annual membership fee of $1,000, which money was to be used to support the activities of the party and its candidates. In response to petitioner's representation that her membership in the Hispanic Democrats would include volunteering her services as an attorney, the Commission ruled that although her membership in the organization was permitted, the donation of professional legal services would be prohibited under Section 138 as a "thing of value." The matter was then returned to the Chancery Court, which considered petitioner's facial constitutional challenge. In an extensive oral opinion, the Chancery Judge declared Section 138 constitutional and granted respondents' motions to dismiss the complaint.

Petitioner appealed this decision as well as the decision of the Commission to the Appellate Division of the Superior Court. The appeals were consolidated, and the appellate court affirmed the Chancery Judge's decision and the ruling of the Commission. The appellate court issued a thorough written opinion in which it held that the State had the requisite compelling interests to justify the marginal restriction on political expression imposed by Section 138; that the statute was narrowly drawn to serve those interests; that the phrase "thing of value" was not unconstitutional either on its face or as applied by the Commission; and that the statute did not violate petitioner's right to the equal protection of the laws (Petition App. at 2a).

Petitioner filed a petition for certification requesting the New Jersey Supreme Court to review the decision of the appellate court. This petition was denied on January 23, 1990 (Petition App. at 1a).

REASONS FOR DENYING THE WRIT

I.

THE STATUTE IMPOSES A REASONABLE RESTRICTION UPON THE ACTIVITIES OF CASINOS AND THEIR HIGH-LEVEL EMPLOYEES TO PREVENT CORRUPTION OR THE APPEARANCE OF CORRUPTION IN THE POLITICAL PROCESSES OF THE STATE AND TO MAINTAIN PUBLIC CONFIDENCE IN THE CASINO REGULATORY SYSTEM.

In 1976, the citizens of New Jersey approved a referendum to amend the State Constitution and permit casino gambling in Atlantic City. N.J. Const., Art. IV, § 7, ¶ 2D (App. at 1a). Soon thereafter, the State Legislature adopted the Casino Control Act ("the Act"). N.J.S.A. 5:12-1 *et seq*. In recognition of casino gambling's historical lure to unsavory elements and its vulnerability to criminal misuse, the Act creates an extraordinarily comprehensive and strict regulatory scheme to control such gambling in New Jersey. This Court has itself recognized this strict regulatory scheme and has characterized it as a comprehensive program "designed to 'vindicate a legitimate and compelling state interest, namely, the interest in combating local crime infesting a particular industry.' " *Brown v. Hotel and Restaurant Employees and Bartenders*, 468 U.S. 491, 509, 104 S. Ct. 3179, 82 L. Ed. 2d 373 (1984) (quoting *DeVeau v. Braisted*, 363 U.S. 144, 155, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960)).

In order to further "public confidence and trust in the credibility and integrity of the regulatory process and of casino operations," the New Jersey Legislature stated that the regulatory provisions of the Act are "designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service

industries. . . . " N.J.S.A. 5:12-1(b)(6) (App. at 2a). The provision attacked by petitioner, N.J.S.A. 5:12-138 ("Section 138"), part of the original Act, seeks to maintain such public confidence and is plainly intended to prevent the corruption or appearance of corruption which can result from contributions by casinos to political candidates or parties. This Court has referred to such corruption as the "financial *quid pro quo* corruption: dollars for political favors," and has acknowledged government's compelling interest in preventing both the reality and appearance of such corruption. *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 497, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985). Uniquely here, though, the feared corruption would threaten public trust not only in the political system but also in the regulatory system which is essential to the presence of gaming in New Jersey. Petitioner's contentions must be viewed in this extraordinary context.

Petitioner's first argument is that this Court's opinion in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), requires that a prohibition of political contributions, as opposed to a limitation, must always be held invalid regardless of the state interest served. The New Jersey courts properly rejected such an overly simplistic interpretation of *Buckley*.[2] The real relevance of *Buckley* to this case is its finding that political contributions are afforded less constitutional protection than independent expenditures. As this Court later explained, "The Court concluded in *Buckley* that there was a fundamental constitutional difference between money spent to advertise one's views and money contributed to be spent on his campaign."

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2. This Court has already affirmed an opinion which upheld a federal statute that effectively prohibited political contributions to a presidential candidate who chose to receive public funding. *Republican National Committee v. Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.), *aff'd*, 616 F.2d 1 (2 Cir.), *aff'd*, 445 U.S. 955, 100 S. Ct. 1639, 64 L. Ed. 2d 231 (1980).

National Conservative Political Action Committee, supra, 470 U.S. at 497. Similarly, this Court also stated that, "We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60, 107 S. Ct. 612, 93 L. Ed. 2d 539 (1986). *See also, Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1420-21, 58 U.S.L.W. 4371, 4385 (1990) (Kennedy, J., dissenting).

It is true that the *Buckley* Court acknowledged "the symbolic expression of support evidenced by a contribution" while noting that a contribution of some amount was still allowed under the provision there in question. *Buckley, supra*, 424 U.S. at 21. *Buckley* did not, however, say that a complete prohibition of political contributions could never be permitted. Even pure speech may be curtailed or prohibited if sufficiently strong interests are to be served. Petitioner's argument ignores this well accepted principle of First Amendment analysis. Moreover, it requires this Court to ponder the question whether the Constitution would be satisfied by a one cent limit which retained the "symbolic expression," but offended by a complete prohibition under identical circumstances. Petitioner's claim that such absolutism exists in the First Amendment only trivializes the Constitution and deserves no further attention by this Court. *See* Note 2, *supra*.

Significantly, Section 138 does not prevent petitioner from speaking out in support of or in opposition to political candidates or parties. Nor is she prohibited from making independent expenditures in favor of political candidates or parties. As interpreted by respondent Commission, Section 138 even permits petitioner to join and serve on political committees or in campaigns, as long as doing so does not require making a prohibited contribution.

Unlike the federal statute under review in *Buckley*, which was applicable to all citizens nationwide, Section 138 applies only to contributions by licensed casinos in New Jersey, as well as their officers and management employees. As such, Section 138 is narrowly tailored to prevent "financial *quid pro quo* corruption" or the appearance of such corruption by casinos. Given the tainted history of casino gambling, and the public's continued wariness of that industry, the State of New Jersey is more than justified in restricting only the "symbolic expression" represented by a political contribution while permitting petitioner to engage in numerous other significant political activities.

The petitioner implies that the restriction of Section 138 is somehow more egregious because it applies to individuals as well as to casinos. However, the lower courts recognized that in order for the provision to be at all effective, it must extend to those natural persons who manage and establish the policies for the casinos. These individuals' interests are properly identified with the casinos' interests. The political contributions of such individuals cannot be separated, either in perception or reality, from those of the casinos for which they work. The compelling interest of the State can therefore only be served by including officers, managers, and high-level employees of the casinos, a group representing less than 4 percent of the casino workforce, within the statutory proscription.[3]

Petitioner also challenges Section 138 because it prohibits casinos and their high-level personnel from making political

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3. Petitioner's position also fails to recognize that a casino licensee need not be a corporate entity. Some casinos are partnerships which include natural persons as general partners. According to petitioner, such "individuals" would also have to be permitted to make monetary contributions. Can it seriously be argued that contributions by a general partner of a casino would be perceived as anything other than contributions of the casino?

contributions of a "thing of value." Petitioner's argument is that the phrase "thing of value" is unconstitutionally vague. The lower courts appropriately dismissed this challenge to Section 138 as well.

According to well established principles, a statute is unconstitutionally vague only if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or to provide sufficient legislative standards to prevent arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). There is no requirement that a statute provide absolute certainty to pass constitutional muster: "Condemned to words, we can never expect mathematical certainty from our language." *Grayned, supra*, 408 U.S. at 110.

Were Section 138 to prohibit one from making monetary contributions only, it would be easily circumvented. The prohibition must therefore be extended to contributions of a "thing of value," as well. There can be little doubt about the core conduct embraced by this provision.[4] Clearly, it is intended to prevent contributions of tangible objects of worth, such as gold and securities, which are easily exchanged for money. In addition, it must apply to equipment and facilities such as telephones and office space, as well as intangibles, such as advertising time or space. A person of ordinary intelligence would easily recognize this and be guided accordingly. So, too, would the regulatory authorities responsible for interpreting and enforcing the provision.

This being so, Section 138 cannot be deemed unconstitutional simply because petitioner can imagine close cases where its reach

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4. A federal statute uses almost identical language in prohibiting the conversion, theft or unauthorized sale of any "thing of value" of the United States. 18 U.S.C.A. § 641 (West 1976). This provision has been found not to be unconstitutionally vague. *United States v. Girard*, 601 F.2d 69 (2 Cir.), *cert. denied*, 444 U.S. 871, 100 S. Ct. 148, 62 L. Ed. 2d 96 (1979).

may be in question. As this Court stated in rejecting a vagueness attack upon several provisions of the Hatch Act: "[T]he general class of offenses to which . . . [the provisions are] directed is plainly within [their] terms, . . . [and they] will not be struck down as vague even though marginal cases could be put where doubt might arise." *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 579, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973) (brackets and ellipses in original) (quoting *United States v. Harris*, 347 U.S. 612, 618, 74 S. Ct. 808, 98 L. Ed. 989 (1954)). Certainly, Section 138 is clear as to the "general class of offenses to which it is directed," and therefore withstands petitioner's facial vagueness challenge.

Petitioner, however, appears to argue that the Commission's ruling that Section 138 prohibited her from donating professional legal services to a political organization exacerbates the provision's constitutional deficiencies. In attacking this part of the Commission's ruling, petitioner cites to language in the appellate court's opinion about the difficulties in defining "professional services." It is not necessary, however, as a matter of constitutional law, that petitioner receive an exhaustive definition of what constitutes professional legal services to save Section 138.

The appellate court correctly noted that, "Here, of course, we are concerned with plaintiff's profession as an attorney" (App. at 30a). Professional legal services may be provided in New Jersey and most other jurisdictions only by those who are licensed to do so. One who performs legal services without this license does so at the risk of criminal sanctions. N.J.S.A. 2A:170-78 (App. at 3a). Surely it is not unreasonable for the State to expect a licensed attorney to be able to distinguish between professional legal services and other volunteer services provided to political candidates or parties. *See Hackin v. State*, 102 Ariz. 218, 427 P.2d 910, *appeal dismissed*, 389 U.S. 143, 88 S. Ct. 325, 19 L. Ed. 2d 347, *reh'g denied*, 389 U.S. 1060, 88 S. Ct. 766, 19 L.

Ed. 2d 866 (1967) (dismissing for want of a substantial federal question a vagueness challenge to state criminal prohibition against "the practice of law" by non-attorneys).

The petition asserts that as a result of the Commission's ruling, "the individual, already barred from making any monetary contribution, is effectively barred from performing volunteer work as well" (Petition at 13). Although the Commission never reached that question because petitioner only sought an opinion as to her legal services, the statute would not be infirm even if petitioner were correct. To prevent the leaders of the casino industry from giving valuable services to an election campaign, and from creating the impression that the campaign is being supported, or worse, orchestrated by the industry, would amply justify a ban against such involvement. Of course, the Commission expressly stated in its ruling that petitioner could become a member of a political party or party committee for the purpose of engaging in political debate, as distinguished from volunteering services otherwise available for a price from a disinterested supplier.

Petitioner cannot be heard to complain about any questions which may remain for others concerning the reach of Section 138. Her proposed activities have been addressed by the Commission more than adequately. There is nothing novel or important about a claim that a state statute, even one dealing with expressive conduct, will have to be refined through application to future cases. What this Court stated with regard to a similar challenge on First Amendment vagueness grounds is equally applicable here, "Moreover, even if the outermost boundaries of § 818 may be imprecise, any such uncertainty has little relevance here, where appellant's conduct falls squarely within the statute's proscriptions . . . . " *Broadrick v. Oklahoma*, 413 U.S. 601, 608, 93 S. Ct. 2908, 37 L.E. 2d 830 (1973).

Any remaining uncertainty concerning the scope of Section

138 is further minimized by the availability of the declaratory ruling procedure employed in this case. In upholding far more severe limitations on political expression by public employees, this Court said:

> It is also important in this respect that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned. [*National Association of Letter Carriers, supra*, 413 U.S. at 580.]

In the present case, petitioner's request for guidance was delayed only because of her refusal to provide the salient facts about her planned activities. Petitioner finally produced this information in response to the order of the Chancery Judge, and the Commission rendered its ruling in less than a month's time. These same administrative procedures can be utilized by that small number of individuals whose proposed activities may fall within the fringe areas of Section 138's reach.

The New Jersey courts also properly rejected petitioner's argument that Section 138 goes too far by prohibiting contributions to any political party or candidate in the State. The concern that casino industry support for a candidate would threaten public confidence in the electoral process applies equally to any candidate for office in the State. While casino gaming in New Jersey is confined by the State Constitution to Atlantic City, the dangers and concerns posed by this unusual business are not. Further, even if the intent of the statute were only to protect against the appearance or fact that the industry could benefit from eased regulations or rulings by certain officials, the courts below properly

acknowledged the undeniable political reality that local elected officials and party leaders can wield influence far beyond the boundaries of their districts. They also recognized that monetary political contributions are fungible and may, in turn, be contributed elsewhere.[5] Even where a monetary contribution is not passed on, or a contribution takes the form of some other "thing of value," such a contribution permits a political party to allocate its resources elsewhere, or could cause an opposing candidate or party to use resources to counter the effects of the contribution. In light of this, and the public's sensitivity to casino gambling's potentially corrupting influence, New Jersey was clearly justified in prohibiting contributions by casinos to any political candidate or party in the State.

Finally, the lower courts were correct to find no merit to petitioner's claim that Section 138 violated her constitutional right to the equal protection of the laws. To bolster this claim, petitioner attempted to portray casino gambling as being the same as other highly regulated industries, such as liquor sales and horseracing, which are not subject to similar prohibitions. The appellate court below categorically rejected this portrayal, citing the New Jersey judiciary's longstanding recognition of the State's compelling need to maintain strict regulatory control over casino gambling due to the unique dangers it poses. *See Greenberg v. Kimmelman*, 99 N.J. 552, 494 A.2d 294 (1985); *In re Martin*, 90 N.J. 295, 447 A.2d 1290 (1982); and *Knight v. Margate*, 86 N.J. 374, 431 A.2d 833 (1981). There is no reason to believe this issue was wrongly decided, much less that it is important or substantial enough to warrant review by this Court. Further, even if Section 138 impinged significantly on a fundamental right and the class of persons included, or excluded, were a suspect class, it is

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5. New Jersey law permits candidates or parties to pass on funds which they receive as contributions to other candidates or party organizations. N.J.A.C. 19:25-7.3 (1990) (App. at 4a).

validated by the confluence of the same, powerful interests which easily overcome petitioner's First Amendment challenge.

CONCLUSION

Section 138 represents a reasonable and measured attempt by New Jersey to prevent corruption or the appearance of corruption of the State's political process by casinos. It is narrowly tailored to serve this compelling interest, since it only restricts casinos and high-level casino personnel from making political contributions. A mere limitation would not obviate the appearance or fact of corruption of the electoral process by casino money and influence. Moreover, casino entities and individuals remain free to endorse political candidates, join political parties and committees, and make unlimited independent expenditures.

The New Jersey courts correctly applied well established constitutional principles in dismissing petitioner's challenge. They appropriately rejected petitioner's simplistic argument that this Court's opinion in *Buckley* stands for the proposition that a prohibition of political contributions must always be held invalid, regardless of the compelling interest served. Their rejection of petitioner's vagueness and equal protection challenges was also well-reasoned and guided by this Court's numerous pronouncements in these areas.

Respondent, Casino Control Commission, therefore submits that the petition for certiorari should be denied.

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APPENDIX A — RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

New Jersey Constitution, Art. 4, § 7, ¶ 2.

> No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election, except that, without any such submission or authorization:
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> D. It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by the State, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, county of Atlantic, and to license and tax such operations and equipment used in connection therewith. Any law authorizing the establishment and operation of such gambling establishments shall provide for the State revenues derived therefrom to be applied solely for the purpose of providing funding for reductions in property taxes, rental, telephone, gas, electric, and municipal utilities charges of, eligible senior citizens and disabled residents of the State, and for additional or expanded health services or benefits or transportation services or benefits to eligible senior

citizens and disabled residents, in accordance with such formulae as the Legislature shall by law provide. The type and number of such casinos or gambling houses and of the gambling games which may be conducted in any such establishment shall be determined by or pursuant to the terms of the law authorizing the establishment and operation thereof.

New Jersey Statute Annotated:

§ 5:12-1 Short title; declaration of policy and legislative findings

(a) This act shall be known and may be cited as the "Casino Control Act."

(b) The Legislature hereby finds and declares to be the public policy of this State, the following:

* * *

(6) An integral and essential element of the regulation and control of such casino facilities by the State rests in the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations. To further such public confidence and trust, the regulatory provisions of this act are designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries as herein provided. In addition, licensure of a limited number of casino establishments, with the

comprehensive law enforcement supervision attendant thereto, is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process.

New Jersey Statute Annotated

§ 2A:170-78 Practice of law limited to licensed attorneys or counselors at law

Any person not licensed as an attorney or counselor at law, and any corporation that:

a. Engages in this state in the practice of law; or

b. Holds himself or itself out to the public, either alone or together with, by or through any other person, whether such other person is so licensed or not, as engaging in or entitled to engage in the practice of law, or as rendering legal service or advice, or as furnishing attorneys or counsel in legal actions or proceedings of any nature; or

c. Assumes, uses or advertises the title of lawyer or attorney at law, or equivalent terms, in the English or any other language —

Is a disorderly person.

Appendix A

New Jersey Administrative Code:

§ 19:25-7.3 Transmittal of funds to another candidate, political committee, or continuing political committee

> Funds received by contributions to a candidate, political committee, or continuing political committee may be transferred before or after deposit to another candidate, political committee, or continuing political committee for any lawful purpose of such other candidate or committee, provided there is no express or implied prohibition by the original contributor against such transmittal.